DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-9307
Title: Armarcion D. Henderson, Petitioner
v.
United States
Docketed: March 15, 2012
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (10-30571)
Decision Date: July 8, 2011
Rehearing Denied: December 15, 2011

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Mar 14 2012	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 16, 2012)
Apr 10 2012	Order extending time to file response to petition to and including May 16, 2012.
May 14 2012	Order further extending time to file response to petition to and including May 25, 2012.
May 23 2012	Brief of respondent United States filed.
May 30 2012	DISTRIBUTED for Conference of June 14, 2012.
Jun 18 2012	DISTRIBUTED for Conference of June 21, 2012.
Jun 25 2012	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jul 6 2012	Motion to appoint counsel filed by petitioner Armarcion D. Henderson.
Jul 24 2012	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 30, 2012.
Jul 24 2012	The time to file respondent's brief on the merits is extended to and including October 19, 2012.
Jul 25 2012	Motion DISTRIBUTED for Conference of September 24, 2012.
Aug 30 2012	Brief of petitioner Armarcion D. Henderson filed.
Sep 6 2012	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Sep 14 2012	SET FOR ARGUMENT ON Wednesday, November 28, 2012.
Oct 1 2012	Motion to appoint counsel filed by petitioner GRANTED. Patricia A. Gilley, Esq., of Shreveport, Louisiana, is appointed to serve as counsel for the petitioner.
Oct 2 2012	Record received from U.S.C.A. for 5th Circuit. (1 envelope)
Oct 2 2012	Record received from U.S.D.C. for Western District of Louisiana. (1 box)
Oct 4 2012	Motion to dispense with printing the joint appendix filed by petitioner Armarcion D. Henderson.
Oct 15 2012	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.

Oct 17 2012	CIRCULATED.
Oct 19 2012	Brief of respondent United States filed.
Nov 19 2012	Reply of petitioner Armarcion D. Henderson filed. (Distributed)
Nov 28 2012	Argued. For petitioner: Patricia A. Gilley, Shreveport, La. (Appointed by this Court.) For respondent: Jeffrey B. Wall, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

No. __-___

IN THE

Supreme Court of the United States

ARMARCION D. HENDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 14, 2012

QUESTION PRESENTED

Rule 52(b) of the Federal Rules of Criminal Procedure permits an appellate court to correct a trial court's "plain error" despite the lack of an objection in the trial court. In *Johnson v. United States*, 520 U.S. 461 (1997), this Court held that, when the governing law on an issue is *settled* against the defendant at the time of trial but then changes in the defendant's favor by the time of appeal, "it is enough that an error be 'plain' at the time of appellate consideration." *Id.* at 468. *Johnson* did not address the timing of plain-error review when the governing law on an issue is *unsettled* at trial but clarified in the defendant's favor while his appeal is pending. The courts of appeals have split 5 to 3 on the question that *Johnson* left open. That question, which this case squarely presents, is:

When the governing law is unsettled at the time of trial but settled in the defendant's favor by the time of appeal, should an appellate court reviewing for "plain error" apply *Johnson*'s time-of-appeal standard, as the First, Second, Sixth, Tenth, and Eleventh Circuits do, or should the appellate court apply the Ninth Circuit's time-of-trial standard, which the D.C. Circuit and the panel below have adopted?

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Armarcion Henderson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

INTRODUCTION

Because the courts of appeals "deal almost daily with issues of plain error," App. 17a (Haynes, J., dissenting from denial of rehearing en banc), this case presents a question of recurring importance in the federal administration of criminal justice. And it offers this Court an ideal vehicle to resolve a conflict that has not only divided the circuits 5 to 3, but also created confusion throughout the federal system.

A defendant generally forfeits a right, including the correction of an error, by failing "'to make [a] timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States v. Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)). But the "plain error" doctrine allows an appellate court to correct a "plain error that affects substantial rights . . . even though it was not brought to the [trial] court's attention." Fed. R. Crim. P. 52(b).

In 2010, the district court below imposed a criminal sentence on petitioner that exceeded the recommended guidelines range by approximately two years in order to ensure that he would have an opportunity to enroll in a drug treatment program. At the time, the law in the Fifth Circuit was unsettled; it did not clearly address whether that upward departure was permissible. Last year, however, this

Court settled the law in *Tapia v. United States*, 131 S. Ct. 2382 (2011), holding that a court may not "impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation." *Id.* at 2393.

On petitioner's post-*Tapia* appeal, the Fifth Circuit explicitly acknowledged that the district court had erred when it imposed the longer sentence, but held that because petitioner had not objected at sentencing it could not correct the mistake unless the error was "plain." App. 1a, 4a. Although no one doubted after *Tapia* that the error was "plain" at the time of the appeal, the panel concluded that the error was not "plain" at the time of sentencing because the law had then been unsettled in the Fifth Circuit. App. 4a. The dispositive issue was thus when the "plainness" of the error should be judged.

In *Johnson v. United States*, 520 U.S. 461 (1997), this Court held that, when "the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration." *Id.* at 468. The court below did not follow *Johnson*, however, because the law here had been unsettled at the time of trial. The panel instead followed the time-of-trial standard first announced by the Ninth Circuit and subsequently adopted by the D.C. Circuit. *See* App. 4a. In so doing, it rejected *Johnson*'s time-of-appeal standard, which the First, Second, Sixth, Tenth, and Eleventh Circuits have all extended to cases in which the law was unsettled at the time of trial.

The lower courts have had numerous opportunities to consider the standard for plain-error review when the law is unsettled at the time of trial. The result

has been a direct, irreconcilable, and deeply entrenched conflict. Nothing would be gained by further percolation. The importance of the issue is underlined by the number of cases in which it has arisen and will likely arise in the future. Because this case offers an ideal vehicle for resolving this important conflict, certiorari should be granted.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-4a) is reported at 646 F.3d 223. The district court's order denying petitioner's Rule 35(a) Motion to Correct a Sentence for Clear Error (App. 5a-7a) is not reported.

JURISDICTION

The court of appeals entered its judgment on July 8, 2011. A timely petition for rehearing was denied by the en banc court on December 15, 2011 (App. 8a-18a), and by the panel on January 30, 2012 (App. 19a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED

Rule 52(b) of the Federal Rules of Criminal Procedure provides:

> **(b) Plain Error.** A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT

Petitioner pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). App. 1a. On June 2, 2010, the district court sentenced him to 60 months' imprisonment, which exceeded the recommended guidelines range of 33-41 months. *Id.* The upward departure (19-27 months) was not intended as additional punishment. On the contrary, it "was necessary to ensure that [petitioner] had an opportunity to enroll in the federal Bureau of Prisons drug treatment program." App. 2a. The district court declared, "'I've got to give him that length of time to do the programming and the treatment and the counselling that [petitioner] needs right now. And that is the reason for that sentence under [18 U.S.C. §] 3553(a)(2)(D).'" App. 39a-40a.[1] When asked if there was "any reason why that sentence as stated should not be imposed," defense counsel responded, "'[p]rocedurally, no, Your Honor.'" App. 41a.

At the time petitioner was sentenced, the courts of appeals were divided on whether a district court may impose a longer prison sentence to promote a defendant's rehabilitation. *See Tapia v. United States*, 131 S. Ct. 2382, 2386 n.1 (2011) (collecting cases). The Fifth Circuit had not yet addressed the issue. *See* App. 4a & n.4. The law was accordingly unsettled in the Fifth Circuit.

On June 10, 2010, eight days after the sentencing hearing, petitioner filed a motion under Federal Rule of Criminal Procedure 35(a) to correct the sentence for

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[1] The cited statute, 18 U.S.C. § 3553(a)(2)(D), provides that "[t]he court, in determining the particular sentence to be imposed, shall consider . . . the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

clear error. He argued that the district court had violated 18 U.S.C. § 3582(a), which requires the court to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." The district court denied the motion. *See* App. 5a-7a.

While petitioner's appeal was pending in the Fifth Circuit, this Court decided *Tapia*. Tapia had received a sentence at the upper end of the guidelines range. In explaining its decision, the sentencing court had "referred several times to Tapia's need for drug treatment" and had "indicated that Tapia should serve a prison term long enough to qualify for and complete" the Bureau of Prisons' Residential Drug Abuse Program. *Tapia*, 131 S. Ct. at 2385. This Court unanimously held that "a court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation." *Id.* at 2393; *see also id.* at 2385 ("[T]he Sentencing Reform Act precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant's rehabilitation.").

Less than a month after *Tapia* was decided, the Fifth Circuit affirmed petitioner's sentence. The court of appeals recognized that, "[u]nder *Tapia*," petitioner was "correct that the district court erred" in "giving him a longer sentence to promote his rehabilitation." App. 1a. But the court of appeals did not correct the error "because he cannot show that the district court plainly erred." *Id.* Even though the Fifth Circuit acknowledged the district court's error, it held that "an error is plain only if it 'was clear under current law *at the time of trial*.'" App. 4a (quoting *United*

States v. Jackson, 549 F.3d 963, 977 (5th Cir. 2008)) (emphasis added by court below).[2]

Petitioner sought both panel and en banc rehearing. The court denied en banc rehearing by a 10-7 vote over Judge Haynes's published dissent (joined by Judge Dennis). *See* App. 8a-18a. Judge Haynes observed that *Johnson v. United States*, 520 U.S. 461 (1997), had established that, "'where the law at time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be "plain" at the time of appellate consideration.'" App. 13a-14a (quoting *Johnson*, 520 U.S. at 468) (alteration in original). She also noted that *United States v. Olano*, 507 U.S. 725 (1993), had "left open the question of whether plain error would be established 'where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified.'" App. 14a (quoting *Olano*, 507 U.S. at 734). Surveying other circuits' decisions, Judge Haynes explained that the "circuits have split over whether *Johnson* applies to the plain error analysis when the law was unclear at the time of trial and later becomes clear." App. 14a-15a (citing decisions of the Ninth and D.C. Circuits for the time-of-trial rule and decisions of the First, Second, Sixth, and Eleventh Circuits for *Johnson*'s time-of-appeal rule).

Judge Haynes stressed the importance of the issue, observing that "[w]e deal almost daily with issues of plain error, and it is certainly not an unusual occurrence for a claim of plain error to be made where the law was unclear at the time of the

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[2] The circuit court also affirmed the district court's denial of the Rule 35(a) motion. *See* App. 3a-4a. That issue is not before this Court.

trial court's decision but is clear by the time of appeal." App. 17a. She also explained why this case is a good vehicle for resolving the important question presented because the "timing issue" is dispositive: "The Supreme Court's decision in *Tapia* establishes that at the time of appeal, the district court's error was plain. I submit that [petitioner] easily meets the other requirements for plain error." *Id.*

Panel rehearing was denied without comment a month and a half later, on January 30, 2012. *See* App. 19a.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DEEPLY DIVIDED OVER WHETHER, WHEN A LEGAL ISSUE IS UNSETTLED AT THE TIME OF TRIAL BUT SETTLED DURING THE APPEAL, REVIEW FOR PLAIN ERROR OCCURS UNDER THE NEWLY SETTLED LAW

This Court's decisions on plain-error review under Federal Rule of Criminal Procedure 52(b) leave open the important question presented here. In *United States v. Olano*, 507 U.S. 725 (1993), this Court explicitly declined to "consider the special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *Id.* at 734. In *Johnson v. United States*, 520 U.S. 461 (1997), the Court again left open *Olano*'s "special case," holding only that courts should review for plain error under the law at the time of appeal "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal." *Id.* at 468.

The courts of appeals are constantly facing *Olano*'s "special case," however, and they are irreconcilably divided on the correct time frame to use in conducting plain-error review. On one side of the split, the First, Second, Sixth, Tenth, and

Eleventh Circuits have extended *Johnson*'s time-of-appeal rule to cases in which the law is unsettled at the time of trial. *See infra* pp. 8-12. The Ninth Circuit, in contrast, has adopted a time-of-trial rule for such cases. *See infra* pp. 12-14. The D.C. Circuit, and now the Fifth Circuit below, adhere to the Ninth Circuit's rule. *See infra* pp. 14-16.

This 5-3 split also has spawned broader confusion. Other courts of appeals have disagreed in dicta about how to conduct plain-error review in the face of newly settled law at the time of appeal. *See infra* p. 17. Many commentators recognize the question left open by *Johnson* and the resulting conflict in the courts of appeals, while others choose one side of the split without acknowledging the other. *See infra* pp. 16-18. That confusion has reached the point that circuits cannot even keep their own law consistent: another Fifth Circuit panel recently applied the time-of-appeal standard to nearly identical facts. *See infra* pp. 15-16.

Fundamental values of fairness and consistency demand that the plain-error standard should not vary depending on which circuit the case arises in or which appellate judges are assigned to hear it. This Court should grant certiorari to answer *Olano*'s open question and settle the conflict.

A. The Courts Of Appeals Are Divided Over Whether To Review For Plain Error Using The Law At The Time Of Appeal Or At The Time Of Trial

1. The First, Second, Sixth, Tenth, and Eleventh Circuits hold that claims of plain error are reviewed using *Johnson*'s time-of-appeal standard

The Tenth Circuit, on facts nearly identical to those here, recently applied *Johnson*'s time-of-appeal standard to a case in which the law was unsettled at trial

but became settled while the case was on appeal. *See United States v. Cordery*, 656 F.3d 1103, 1105-06 (10th Cir. 2011). In *Cordery*, as here, a trial court extended a sentence so that the defendant could participate in a drug treatment program, and the defendant did not object. *Id.* at 1105. At the time of sentencing, the circuit law regarding such an extension was unsettled. While the defendant's appeal was pending, however, the Tenth Circuit and then this Court decided that rehabilitation is not a valid basis for lengthening a sentence. *See Tapia v. United States*, 131 S. Ct. 2382, 2391 (2011); *United States v. Story*, 635 F.3d 1241 (10th Cir. 2011). On appeal in *Cordery*, the Tenth Circuit then reversed for plain error in light of *Tapia* and *Story*. 656 F.3d at 1106-07. In so doing, it looked to the law at the time of appeal to conclude that the error was plain, expressly rejecting the Ninth Circuit's time-of-trial standard. *Id.* at 1107.

Like other circuits in the split, the Tenth Circuit explained that *Johnson* "brings no clarity to cases . . . where the law at the time of the contested decision was unsettled, but clarified while the appeal was pending." *Id.* It acknowledged "that the question of whether an error must be plain at the time of trial or merely at the time of appeal has divided the circuits." *Id.* The Tenth Circuit recognized that the Ninth and D.C. Circuits, on one side of the conflict, interpret *Johnson* as creating a "narrow exception to an otherwise broad rule that an error is 'plain' only if it was clear at the time of the district court's decision." *Id.* (citing *United States v. Mouling*, 557 F.3d 658, 663-64 (D.C. Cir. 2009); *United States v. Turman*, 122 F.3d 1167, 1170 (9th Cir. 1997)). On the other side of the conflict are circuits that adopt

a "blanket rule that plain error is measured at the time of appeal." *Id.* (citing *United States v. Smith*, 402 F.3d 1303, 1315 n.7 (11th Cir.), *vacated on other grounds*, 545 U.S. 1125 (2005); *United States v. Ross*, 77 F.3d 1525, 1539 (7th Cir. 1996)).

The *Cordery* court held that "it is the law of this circuit that we side with the latter view," reviewing for plain error under the law at the time of appeal. *Id.* The Tenth Circuit accordingly joined the majority in favor of applying *Johnson*'s time-of-appeal standard to cases in which the governing law was unsettled at the time of trial.

The First Circuit also recently acknowledged this circuit split and joined the majority in favor of the time-of-appeal standard. *See United States v. Farrell*, No. 10-1140, 2012 WL 516069, at *8-*9 (1st Cir. Feb. 17, 2012).[3] Explaining that this Court in *Johnson* "left open the question of whether plain error would be established where the law was *unsettled* at the time of trial, and subsequently clarified while the appeal was pending," the court acknowledged that "[t]he circuits are divided on this issue." *Id.* at *8. It then joined the majority view "that 'the time of appellate consideration' standard applies regardless of the law's clarity at the time of trial." *Id.* at *8-*9. The court explained that "[t]his approach is consistent with the principles undergirding the forfeiture doctrine . . . . Plain error review is not a

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[3] The district court in *Farrell* had held that breaking and entering a vessel in the daytime constituted a violent offense under the Armed Career Criminal Act, 18 U.S.C. § 924(e). *See* 2012 WL 516069, at *1, *4. Circuit law was then unsettled on that issue. *See id.* at *6. While Farrell's appeal was pending, the First Circuit held that a similar crime was not a violent offense under a similar statute. *See id.* (citing *United States v. Brown*, 631 F.3d 573 (1st Cir. 2011)). The court of appeals accordingly determined that the district court had erred and the error was plain under the time-of-appeal standard. *See id.* at *8-*9.

vehicle for gauging the magnitude of the district court's mistake; rather, it functions as a limitation on the appellate court's discretion. We do not correct forfeited errors that are questionable or inconsequential, but only those that are 'plain' and 'affect substantial rights.'" *Id.* at *9. Furthermore, the court recognized that "assessing the plainness of error at the time of appellate consideration allows the reviewing court to avoid the elusive and potentially onerous case-by-case determination of whether the law was 'settled' or 'unsettled' at the time of trial." *Id.* (citing *Smith*, 402 F.3d at 1315 n.7).

In *United States v. Garcia*, 587 F.3d 509 (2d Cir. 2009), the Second Circuit similarly held that plain error "'is determined by reference to the law as of the time of appeal'" in these circumstances. *Id.* at 520 (quoting *United States v. Gamez*, 577 F.3d 394, 400 (2d Cir. 2009)). The court of appeals held that Garcia could benefit from this Court's decision in *Cuellar v. United States*, 553 U.S. 550 (2008), which was decided while his appeal was pending and clarified law that had previously been unsettled in the circuit. *See Garcia*, 587 F.3d at 519-20.

The Sixth Circuit also applies the time-of-appeal standard. *See United States v. Brown*, No. 97-1618, 2000 WL 876382, at *12 (6th Cir. June 20, 2000) (unpublished). The *Brown* court reasoned that, "[e]ven where an issue was unsettled at the time of trial, the error is 'plain' if it is clear and obvious at the time of appellate consideration." *Id.* Applying the time-of-appeal standard, the Sixth Circuit concluded that, "[s]ince the district court's error is *now* clear . . . , although it was

not clear at the time of trial, the second prong of 'plain error' analysis is satisfied." *Id.*[4]

Finally, the Eleventh Circuit also reviews for plain error under the time-of-appeal standard. *See Smith*, 402 F.3d at 1315 n.7, 1323.[5] The Eleventh Circuit reasoned that applying the law at the time of appeal "has the advantage of avoiding the necessity of distinguishing between cases in which 'the law at the time of trial was settled and clearly contrary to the law at the time of appeal' on the one hand and cases in which it was merely 'unsettled' on the other." *Id.* at 1315 n.7. Rejecting the Ninth Circuit's time-of-trial standard, the Eleventh Circuit pointed out that reviewing for the plainness of error under the time-of-trial standard "is the same as no plain error review at all, as error will never be 'plain' under 'unsettled' law." *Id.* (citing *Turman*, 122 F.3d at 1170-71).

2. The Ninth and D.C. Circuits hold that plain error is reviewed under the law at the time of trial

In contrast to the First, Second, Sixth, Tenth, and Eleventh Circuits, the Ninth Circuit reviews for plain error under a time-of-trial standard. In *Turman*, the Ninth Circuit explained that, "[w]hen the state of the law is unclear at trial and

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[4] The Sixth Circuit has since reaffirmed its support for the time-of-appeal standard in dicta. *See United States v. Gabrion*, 517 F.3d 839, 875 (6th Cir. 2008) ("For us to consider the error plain, however, the error does not need to be obvious at the time of the trial but rather can become obvious pending appeal. . . . [A]lthough the law regarding 16 U.S.C. § 480 and 40 U.S.C. § 255 . . may not have been clear at the time of trial, the jury instruction may still have constituted plain error.").

[5] The Eleventh Circuit's decision in *Smith* was vacated and remanded for reconsideration in light of this Court's Commerce Clause holding in *Gonzalez v. Raich*, 545 U.S. 1 (2005). *See United States v. Smith*, 545 U.S. 1125 (2005). On remand, the Eleventh Circuit did not revisit the plain-error question because, as a result of *Raich*, it found no error, let alone plain error. *See United States v. Smith*, 459 F.3d 1276, 1284 (11th Cir. 2006). Although the Eleventh Circuit has not returned to this question, other courts consider *Smith* part of this split. *See, e.g., Farrell*, 2012 WL 516069, at *8; *Mouling*, 557 F.3d at 664.

only becomes clear as a result of later authority, the district court's error is perforce not plain." 122 F.3d at 1170. The court followed what it saw as the general rule that "plain error . . . normally means error plain at the time the district court made the alleged mistake." *Id.*

The Ninth Circuit recently reaffirmed its time-of-trial standard in *United States v. Wahid*, 614 F.3d 1009 (9th Cir.), *cert. denied*, 131 S. Ct. 840 (2010). The court explicitly acknowledged that the "analysis for plain error differs depending on whether the state of the law was unclear at the time of the trial or was settled at the time of trial and clearly contrary to the law at the time of the appeal." *Id.* at 1015 (citing *Turman*, 122 F.3d at 1170).

In *Mouling*, the D.C. Circuit acknowledged the circuit conflict and adopted the Ninth Circuit's time-of-trial standard. *See* 557 F.3d at 664. The *Mouling* court "agree[d] with the Ninth Circuit that *Johnson* represents an exception to the general rule that error is assessed as of the time of trial." *Id.* (citing *Turman*, 122 F.3d at 1170). The court then explained that, "where, as here, the law was unsettled at the time of trial but became settled by the time of appeal, the general rule applies, and we assess error as of the time of trial." *Id.* Like the Ninth Circuit, the D.C. Circuit reasoned that the time-of-trial standard is appropriate because objections to rulings based on unsettled law "serve a valuable function, alerting the district court to potential error at a moment when the court can take remedial action." *Id.* Because district courts may alter rulings based on unsettled law when a party objects, "the interest in requiring parties to present their objections to the trial

court, which underlies plain error review, applies with full force" when the law is unsettled at trial. *Id.*[6]

3. The Fifth Circuit panel below joined the Ninth and D.C. Circuits in applying the time-of-trial standard

In this case, as explained above, *supra* pp. 5-6, the Fifth Circuit panel joined the Ninth and D.C. Circuits in applying the time-of-trial standard. *See* App. 1a-4a. Despite a vigorous dissent and seven judges voting to rehear the case en banc, the full court allowed the panel decision to stand. *See* App. 8a-18a. That disposition is perhaps the best indication of the current state of the law in the Fifth Circuit.

Unfortunately, confusion remains. After the en banc Fifth Circuit denied rehearing in this case, Fifth Circuit panels have split on the issue – and some judges have even come down on both sides. *Compare United States v. Broussard*, No. 11-30274, 2012 WL 309102, at *14 (5th Cir. Feb. 1, 2012) (applying the time-of-appeal standard), *with United States v. Davis*, No. 10-11178, 2012 WL 253825, at *1 (5th Cir. Jan. 27, 2012) (applying the time-of-trial standard).

Broussard involved facts nearly identical to those here. The sentencing judge considered Broussard's need for treatment in deciding his sentence, thereby violating *Tapia*'s subsequently announced ban on the imposition of longer sentences to promote defendants' rehabilitative needs. *See* 2012 WL 309102, at *12 (citing *Tapia*, 131 S. Ct. at 2391). But the *Broussard* court expressly rejected the time-of-trial standard adopted by the panel in this case and instead applied the time-of-

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[6] The D.C. Circuit recently reaffirmed its adoption of the Ninth Circuit's time-of-trial standard in *United States v. Anderson*, 632 F.3d 1264, 1270 (D.C. Cir. 2011) (applying the *Mouling* time-of-trial standard when the law was unsettled at the time of trial but settled by the time of appeal).

appeal standard. *Id.* at *14. Under that standard, the panel held that the sentencing error was plain under *Tapia*, vacated the sentence, and remanded for resentencing. *Id.* at *14-*15.

On the other hand, the Fifth Circuit in *Davis* recently reviewed for plain error under the law at the time of trial. *See* 2012 WL 253825, at *1. In *Davis*, the district judge revoked the defendant's supervised release and then considered the sentencing factors in 18 U.S.C. § 3553(a)(2)(A) in deciding his ultimate sentence. *Id.* Between the revocation of his supervised release and the consideration of his appeal, the Fifth Circuit held in another case that judges cannot consider those sentencing factors in revoking supervised release. *Id.* (citing *United States v. Miller*, 634 F.3d 841 (5th Cir.), *cert. denied*, 132 S. Ct. 496 (2011)). The *Davis* court applied a time-of-trial standard and affirmed his sentence, however, explaining that "the split among the circuit courts of appeals on [this] issue and the lack of a published opinion from this court at the time of the district court proceedings rendered any consideration of the § 3553(a)(2)(A) factors neither clear nor obvious legal error." *Id.* Another recent Fifth Circuit case involving similar facts but a different defendant also applied the time-of-trial standard. *See United States v. Davis*, No. 10-11152, 2011 WL 6379317, at *1 (5th Cir. Dec. 21, 2011) (concluding that there was no plain error in the district judge's reliance on impermissible sentencing factors in revoking the defendant's supervised release because the law was unsettled at trial and had become settled only by the intervening decision in *Miller*).

The full Fifth Circuit had the opportunity to choose a timing standard for judging plain error in this case, but it declined to do so. *See* App. 8a, 18a ("Given the discord within our own circuit (and that among our sister circuits), I submit that the full court should resolve this question.") (Haynes, J., dissenting from denial of rehearing en banc). That deeply divided rejection of en banc review suggests that the Fifth Circuit will not resolve the issue, and Fifth Circuit panels will continue to apply inconsistent standards in conducting plain-error review depending on which judges are drawn for the panel.

Moreover, even if the Fifth Circuit were to address this issue en banc and establish a standard for the timing of plain-error review in the circuit, such a decision could not resolve the deep and entrenched circuit split. Rather, it would only establish the Fifth Circuit's position in the ongoing disagreement. Because of the strong inter-circuit disagreement and the Fifth Circuit's decision not to resolve this issue in its own circuit, the split will persist without this Court's intervention.

4. Commentators recognize the division in circuits over this issue

Many secondary sources identify this entrenched split among the courts of appeals. As Judge Edwards noted in 2007, "[w]hat the Supreme Court has yet to decide is whether an error will be considered plain when it is clear under the law at the time of appeal, but the law at the time of trial was unsettled. Only the Ninth and Eleventh Circuits appear to have definitively resolved this question, though in opposite directions." HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL COURTS STANDARDS OF REVIEW 92 (2007) (citation omitted); *see also* Toby J. Heytens,

Managing Transitional Moments in Criminal Cases, 115 YALE L.J. 922, 952 (2006) ("[C]ontroversies have also erupted over the proper approach to applying the second *Olano* factor, 'plain error,' when the law was unclear at the time of trial. Most courts that have addressed the issue have said that plainness should be addressed as of the time of appeal .... Other circuits, however, have endorsed a time-of-trial approach.") (footnote omitted).

B. Other Courts Of Appeals In Dicta And Commentators Disagree About Whether To Follow The Time-Of-Appeal Or Time-Of-Trial Standard In These Circumstances

This intractable 5-3 split has fostered confusion and uncertainty nationwide. The Seventh Circuit supports the time-of-appeal standard and the Fourth Circuit supports the time-of-trial standard, but neither has decided the precise question raised here. *See Helsabeck v. Fabyanic*, 173 F. App'x 251, 255-56 (4th Cir. 2006) (noting that the Fourth Circuit has not reached a holding on this issue); *United States v. David*, 83 F.3d 638, 645 (4th Cir. 1996) (adopting the time-of-trial standard); *Ross*, 77 F.3d at 1539 (adopting the time-of-appeal standard).

Like many of the courts of appeals, commentators disagree about when courts judge the plainness of an error if the law was unsettled at trial. Some explain that courts apply the time-of-trial approach. *See* 3B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 856, at 141 n.19 (Supp. 2011) ("'[When] the law was unsettled at the time of trial but became settled by the time of appeal, the general rule applies, and we assess error as of the time of trial.'") (quoting *Mouling*, 557 F.3d at 664). Others recognize the time-of-appeal approach. *See* 9B FEDERAL PROCEDURE, LAWYERS EDITION § 22:2294, at 466-67 (2005) ("[A]n error is plain for

purposes of plain error review, even though it was not clear at the time of trial, as long as it is clear at the time of appellate consideration.").

Commentators also disagree about the scope of *Johnson*. Some read *Johnson* broadly and suggest that its holding applies to cases in which the law was unclear at trial. *See* 1 PAUL G. ULRICH, FEDERAL APPELLATE PRACTICE GUIDE 9TH CIRCUIT § 10:15 (2d ed. 2011) ("[W]hen the state of the law at the time of trial is unclear and becomes clear only as a result of later authority, the Supreme Court has held the plainness of the error is determined as of the time of appellate review.") (citing *Johnson*, 520 U.S. at 467-69). Others read *Johnson* as an exception to a general time-of-trial standard. *See* TIMOTHY A. BAUGHMAN, GILLESPIE MICHIGAN CRIMINAL LAW AND PROCEDURE WITH FORMS PRACTICE DESKBOOK § 1:70 (2011) ("Whether an error was 'plain' is judged by the state of the law at the time of trial, as any broader definition would require a trial judge to be clairvoyant. An exception exists where the law was settled at the time of trial and clearly contrary to the law at the time of appeal.") (citing *Johnson*).

The commentators' confusion is understandable. *Johnson* has permitted and will continue to permit diverging interpretations until this Court clarifies at what point a reviewing court should judge the plainness of an error. As discussed below, this case offers the Court an excellent opportunity to do so.

II. THE COURT BELOW ERRED IN ASSESSING PETITIONER'S PLAIN-ERROR CLAIM IN LIGHT OF THE UNSETTLED LAW AT THE TIME OF HIS TRIAL RATHER THAN THE SETTLED LAW AT THE TIME OF HIS APPEAL

A. Reviewing For Plain Error Based On The Unsettled Law At The Time Of Trial Rather Than The Settled Law At The Time Of Appeal Undermines The Integrity Of Judicial Review

This Court has made clear that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). That requirement is grounded on the distinction between legislation and adjudication, and on the integrity of judicial review:

> [T]he nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule. But after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review.

Id. at 322-23. Evaluating the plainness of error at the time of trial is inconsistent with the requirement that settled law be applied to all cases not yet final when the law becomes settled, and thereby undermines the integrity of judicial review.

B. Reviewing For Plain Error Based On The Unsettled Law At The Time Of Trial Rather Than The Settled Law At The Time Of Appeal Contravenes This Court's Insistence On Treating Similarly Situated Defendants Similarly

This Court has recognized often the importance of affording equal treatment to similarly situated litigants by applying the same rules to similar cases on direct review. In *United States v. Johnson*, 457 U.S. 537 (1982), the Court acknowledged "the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary of a retroactively applied

rule." *Id.* at 555 n.16. Rejecting its prior "ambulatory retroactivity doctrine," the Court embraced "the Harlan approach" to retroactivity, which would "further the goal of treating similarly situated defendants similarly." *Id.* at 555 & n.17. *See also Powell v. Nevada*, 511 U.S. 79, 84 (1994) ("'[S]elective application of new rules violates the principle of treating similarly situated defendants the same.'") (quoting *Griffith*, 479 U.S. at 323). The same imperative applies in noncriminal cases as well. *See, e.g., James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537 (1991) ("[S]elective prospectivity also breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally."); *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 212-13 (1990) ("Fundamental notions of fairness and legal process dictate that the same rules should be applied to all similar cases on direct review. . . . [W]hen the legal rights of the parties have not been finally determined by a court of law, 'simple justice' requires that a rule of law, even a 'new' rule, be evenhandedly applied.") (citation omitted).

Evaluating for plain error at the time of trial contravenes this basic principle of "evenhanded justice" for similarly situated defendants. *Teague v. Lane*, 489 U.S. 288, 300 (1989) ("[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."). Imagine that petitioner had a co-defendant, arrested for the same offense on the same day, and that both were tried and convicted by the same court. Imagine further that the court imposed, without objec-

tion, an identical five-year sentence to allow for the co-defendant to participate in a rehabilitation program, but the co-defendant was sentenced one week later than petitioner. Finally, assume that this Court's opinion in *Tapia* was handed down during the week separating the two sentencing hearings. On appeal for plain error, under the Ninth Circuit's time-of-trial standard used by the court below, petitioner would not be entitled to relief while his co-defendant would. Only by using the time-of-appeal standard for plain-error review can courts of appeals ensure that similarly situated defendants are treated similarly, as this Court's precedents demand.

C. Applying A Time-Of-Trial Standard To Cases In Which The Law Was Unsettled At The Time Of Trial Will Lead To Wasted Judicial Resources As Courts Of Appeals Attempt To Determine Whether The Law Was Settled Or Unsettled At The Time Of Trial

Claim-presentation rules, and the exceptions to them, are intended to conserve judicial resources. *See Turman*, 122 F.3d at 1170 ("An objection affords the judge an opportunity to focus on the issue and hopefully avoid the error, thereby saving the time and expense of an appeal and retrial."). In adopting the time-of-appeal rule in *Johnson*, this Court relied in part on considerations of judicial economy: "[A time-of-trial rule] would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent." 520 U.S. at 468.

In choosing to depart from *Johnson* and follow a time-of-trial rule for plain-error inquiries in cases in which the underlying law is unsettled, the Ninth Circuit concluded that *Johnson*'s judicial-economy justification applied *only* to cases in

which the law was firmly settled against the defendant. *See Turman*, 122 F.3d at 1170 ("In that situation, objections are pointless. . . . This is not such a case."). More recently, the D.C. Circuit reached the same conclusion. *See Mouling*, 557 F.3d at 664.

The *Turman* and *Mouling* conclusions are in error. The Ninth Circuit's rule, which evaluates the plainness of error at the time of appeal when the law was *settled* at the time of trial (following *Johnson*) but at the time of trial when the law was *unsettled* at the time of trial, will generate extensive and wasteful litigation in the appellate courts over whether the law was settled or unsettled at the time of trial. By contrast, a rule unified as a time-of-appeal standard "allows the reviewing court to avoid [this] elusive and potentially onerous case-by-case determination." *Farrell*, 2012 WL 516069, at *9.

Recent cases applying *Johnson* illustrate the difficulties involved. In *United States v. Mercado-Ortiz*, 380 F. App'x 565 (9th Cir. 2010) (unpublished), for example, the bulk of the panel opinion is devoted to an analysis of the state of circuit precedent at the time of trial. The defendant was convicted of illegal reentry after deportation, and his sentence was enhanced based on his prior conviction for a crime of violence, specifically third-degree child molestation under a Washington state statute. *Id.* at 566. The panel, following *Turman*, reviewed its now-outdated definition of "sexual abuse of a minor" under two precedents antedating the trial, but ignored the effect of more recent holdings. *Id.* at 567. It first analyzed whether those precedents settled the law against the defendant, which would have invoked

the rule of *Johnson*, but concluded that they did not. *Id.* The panel then analyzed whether the two precedents clearly settled the law in favor of the defendant, which would have made the error plain at the time of the trial. *Id.* at 567-68. After careful consideration of each, it again concluded that they did not. *Id.* Only then could it say that the law was unsettled at the time of trial, so that it could apply *Turman*. Under a time-of-appeal standard, such difficult and time-consuming line-drawing exercises are unnecessary.

D. Reviewing For Plain Error Based On The Unsettled Law At The Time Of Trial Rather Than The Settled Law At The Time Of Appeal Essentially Eliminates Plain-Error Review

The plain-error principle of Rule 52(b) was created to allow courts to correct obvious injustices notwithstanding the defendant's failure to object at trial. *See United States v. Young*, 470 U.S. 1, 15 n.12 (1985) ("A review of the drafting that led to the Rule shows that the [Advisory] Committee sought to enable the courts of appeals to review prejudicial errors 'so that any miscarriage of justice may be thwarted.'") (quoting Fed. R. Crim. P. at 263 (Preliminary Draft (1943))). Assessing for plain error based on the unsettled law at the time of trial is "the same as no plain error review at all, as error will never be 'plain' under 'unsettled' law." *Smith*, 402 F.3d at 1315 n.7. Thus, under the Ninth Circuit's time-of-trial standard applied by the court below, "the defendant is obliged to object if the law is unsettled, and if he does not he has waived the objection forever." *Id.*

III. THE TIMING OF PLAIN-ERROR REVIEW IS AN IMPORTANT ISSUE THAT SHOULD BE DECIDED BY THIS COURT

A. This Issue Recurs Any Time The Law Changes From Unsettled To Settled

Petitioner's dilemma faces a criminal defendant any time that this Court or a court of appeals clarifies law that was previously unsettled and the defendant has failed to object. Because one of this Court's primary functions is to clarify legal issues that have generated conflicts, *see* Sup. Ct. R. 10, it by custom and rule does not typically deal with law that is well-settled.[7] In addition, criminal decisions in the courts of appeals regularly clarify law that was previously unsettled and thus create an opportunity for plain-error review.

Because defendants cannot realistically object to every issue of law, settled or otherwise, plain-error analysis is one of the more common procedural issues for lower courts. As Judge Haynes stated in her dissent from the Fifth Circuit's denial of rehearing en banc, "[w]e deal almost daily with issues of plain error, and it is certainly not an unusual occurrence for a claim of plain error to be made where the law was unclear at the time of the trial court's decision." App. 17a (Haynes, J., dissenting from denial of rehearing en banc). In fact, Judge Haynes identified three Fifth Circuit cases in the past year with the same procedural setting as petitioner's. App. 17a-18a. As an example of how frequently the plain-error rule arises, in 2011 the courts of appeals cited the standard from *Olano* more than 400 times and cited *Johnson* more than 78 times. As the government has recognized in a prior case

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[7] Justice Scalia has noted in the federal-state context that, "I think we will be little tempted to intervene when the settled law below seems at least reasonable." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186 (1989).

before this Court, "plain-error issues are of great systemic consequence, and the existence of a flawed approach to plain-error review in one context holds the potential to destabilize plain-error doctrine more broadly." Petition for a Writ of Certiorari at 19, *United States v. Marcus*, 130 S. Ct. 2159 (2010) (No. 08-1341), *available at* http://www.justice.gov/osg/briefs/2008/2pet/7pet/2008-1341.pet.aa.pdf.

This Court itself has recognized that plain-error review is of particular importance by addressing the issue seven times in the past 20 years. *See United States v. Marcus*, 130 S. Ct. 2159 (2010); *Puckett v. United States*, 556 U.S. 129 (2009); *United States v. Dominguez Benitez*, 542 U.S. 74 (2004); *United States v. Cotton*, 535 U.S. 625 (2002); *United States v. Vonn*, 535 U.S. 55 (2002); *Johnson v. United States*, 520 U.S. 461 (1997); *United States v. Olano*, 507 U.S. 725 (1993). This case presents an opportunity for the Court to resolve one of the last remaining problems in determining whether an error is "plain." This Court has already addressed the plain-error rule "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal." *Johnson*, 520 U.S. at 468. It should now take the final step and fully address the "special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *Olano*, 507 U.S. at 734.

B. This Court's Resolution Of This Issue Would End The Disparate Treatment Of Criminal Defendants Among The Circuits

This Court's guidance on the plain-error rule is necessary to ensure uniform treatment of criminal defendants among the circuits. The current circuit split violates key principles that the Court has used in addressing questions of plain-

error review and retroactivity. The *Griffith* Court's rule of retroactivity was aimed at ensuring that lower courts "treat[] similarly situated defendants the same." 479 U.S. at 323. In addition, one of the factors for plain-error review is whether the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732 (alteration in original).

The current circuit conflict naturally creates disparate treatment of defendants based on geography, a problem starkly highlighted by the different outcomes of this case and *Cordery*, *supra* p. 9, which involve virtually identical facts. Both defendants received sentence enhancements for rehabilitation in violation of *Tapia*. Both defendants failed to object at trial in the face of unsettled precedent. Yet the Tenth Circuit ordered that Cordery receive a new sentence, while petitioner faces roughly two years of additional prison time simply because he was tried in the Fifth Circuit. Without review by this Court on the plain-error issue, future defendants will be similarly left to face an arbitrary application of the plain-error rule based only on the location of their trial court.

The conflicting rules applied by different circuits ensure that "similarly situated" defendants receive different treatment under the law whenever the criminal law changes. As it stands, time-of-appeal circuits give all criminal defendants on appeal the benefit of new law but time-of-trial circuits limit this benefit to those few who have previously objected to the exact issue (or to cases in which the law was settled in the circuit at the time of trial). In effect, defendants in the same procedural posture – those who have forfeited claims when the law was unsettled at

the time of trial – will receive disparate treatment by lower courts simply because of their circuit's interpretation of the plain-error rule.

Moreover, having the success of a defendant's claim depend only on geography "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732 (alteration in original). Until this Court settles this issue, the fairness, integrity, and reputation of the judicial process of retroactivity will continue to be called into question by the selective application of the circuits' varying rules.

IV. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR THIS COURT TO ADDRESS WHETHER "PLAINNESS" IS REVIEWED AT THE TIME OF TRIAL OR THE TIME OF APPEAL

This case presents an ideal vehicle for the Court to clarify whether plain-error review should be assessed at the time of trial or at the time of appeal. Besides the disputed issue – whether an error's "plainness" should be judged at the time of trial or the time of appeal – petitioner's sentence enhancement of 19-27 months in violation of *Tapia* easily meets the other requirements for plain error. For a defendant to show plain error, there must be (1) "error"; (2) that is "plain"; (3) that "affect[s] substantial rights"; and (4) that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732 (internal quotation marks omitted; alterations in original). Only the second prong of the *Olano* analysis is in dispute.

The facts of this case are uncomplicated. The district court found petitioner guilty pursuant to a plea agreement. *See* App. 1a. The court then announced that it would sentence petitioner to 60 months' imprisonment, rather than the guidelines

range of 33-41 months. *See* App. 28a-29a, 39a. At the sentencing hearing, the judge announced that he "want[ed] the record to reflect that this sentence is a [18 U.S.C. §] 3553(a) sentence, particularly under subparagraph (2)(D), because this defendant needs training, he needs counselling, and he needs substance abuse treatment within the confines of that system." App. 39a. Before petitioner's appeal was decided, *Tapia* established that courts may not "impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation." 131 S. Ct. at 2393.

Tapia establishes that the district court's sentence was error. At sentencing, the court left no doubt that it relied upon a factor that this Court in *Tapia* held impermissible, and that factor led to the sentence enhancement. *See* App. 39a-40a. Because petitioner's sentence was enhanced by roughly two years, his case satisfies the third and fourth prongs of the *Olano* test. *See* App. 17a (petitioner "easily meets the other requirements for plain error because the district court, in granting a longer sentence, considered a factor the Supreme Court has stated is an impermissible consideration") (Haynes, J., dissenting from denial of rehearing en banc); *United States v. Andino-Ortega*, 608 F.3d 305, 311-12 (5th Cir. 2010) (holding that a misinterpretation of the sentencing guidelines satisfied the third and fourth prongs of the *Olano* test); *United States v. Villegas*, 404 F.3d 355, 364-65 (5th Cir. 2005) (same).

This important issue is ripe for review, and further percolation in the courts of appeals is unnecessary. Eight circuits have squarely addressed this issue, creat-

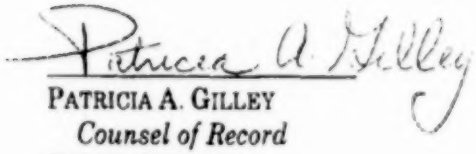
ing a 5-3 split. Two more circuits have addressed the issue in dicta, coming out on both sides of the conflict. Despite the confusion in the Fifth Circuit, it would be pointless to defer consideration of this case to allow the Fifth Circuit to resolve its internal disagreements. In this case, all of that court's members carefully considered the question presented and voted 10-7 over a vigorous published dissent to deny the petition for rehearing en banc. More importantly, even if the Fifth Circuit did decide the issue en banc, the federal circuits would still be divided either 5-3 or 6-2. The conflict will not be resolved absent a decision by this Court.

This case presents the sole question of whether error should be judged at the time of trial or at the time of appeal, and the facts and law surrounding other aspects of the case are clear. This case would accordingly provide an excellent vehicle for this Court to clarify the correct standard for plain-error review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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March 14, 2012

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-30571

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARMARCION D. HENDERSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana

[Filed July 8, 2011]

Before SMITH, SOUTHWICK, and GRAVES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Armarcion Henderson argues that the district court erred by giving him a longer sentence to promote his rehabilitation. Under *Tapia v. United States*, No. 10-5400, 2011 WL 2369395 (U.S. June 16, 2011), Henderson is correct that the district court erred. Henderson did not preserve the error, however, and we affirm, because he cannot show that the district court plainly erred.

I.

Henderson pleaded guilty of being a felon in possession of a firearm under 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Although the sentencing guideline range was 33 to 41 months, Henderson was sentenced to 60 months of imprisonment. The dis-

trict court stated that the upward departure was necessary to ensure that Henderson had an opportunity to enroll in the federal Bureau of Prisons drug treatment program:

> I want the record to reflect that this sentence is a [18 U.S.C. §] 3553(a) sentence, particularly under subparagraph (2)(D),[1] because this defendant needs training, he needs counselling [sic], and he needs substance abuse treatment within the confines of that system.
>
> . . . . I've got to give him that length of time to do the programming and the treatment and the counselling [sic] that this defendant needs right now. And that is the reason for that sentence under 3553(a)(2)(D).

Henderson did not object to the sentence. When asked if there was "any reason why that sentence as stated should not be imposed," his attorney responded, "[p]rocedurally, no, Your Honor."

Eight days after the sentencing hearing, Henderson filed a motion under Federal Rule of Criminal Procedure 35(a) to correct the sentence, arguing that the court violated the admonition of 18 U.S.C. § 3582(a) that

> [t]he court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.

The district court denied the motion, and Henderson appeals.

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[1] Title 18 U.S.C. § 3553(a)(2)(D) provides that "[t]he court, in determining the particular sentence to be imposed, shall consider . . . the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

II.

The first issue is whether Henderson's rule 35(a) motion preserved his claim of error. We have previously held that a rule 35(a) motion preserved a claim of error under *United States v. Booker*, 543 U.S. 220 (2005). *United States v. Watkins*, 450 F.3d 184, 185 (5th Cir. 2006) (per curiam). *Watkins* does not control here, however, because the *Booker* error in that case was clear.[2] It was thus correctable under rule 35(a), which allows the court to correct only sentences "that resulted from arithmetical, technical, or other clear error." Because the purpose of waiver doctrine is to "give[] the district court the opportunity to consider and resolve [errors],"[3] however, a rule 35(a) motion can preserve error only if it gave the district court an opportunity to correct it. Consequently, a rule 35(a) motion cannot preserve an error unless the error is arithmetical, technical, or otherwise clear.

A sentencing error is clear under rule 35(a) only if it is not the result of "the exercise of the court's discretion with regard to the application of the sentencing guidelines." *United State v. Ross*, 557 F.3d 237, 241 (5th Cir. 2009). That rule flows from the comments of the advisory committee that Rule 35(a) is "'very narrow and . . . extend[s] only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action.'" *Id.* at 239 (quoting FED. R. CRIM. P. 35 advisory committee's note).

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[2] The Supreme Court had decided *Booker* immediately before Watkins's Rule 35(a) motion, so it was clear at the time of the motion that the district court should not have considered judge-found facts when operating under a mandatory guidelines regime. *Watkins*, 450 F.3d at 185.

[3] *Puckett v. United States*, 129 S. Ct. 1423, 1428 (2009).

Before *Tapia*, there was a circuit split on whether a district court can consider a defendant's rehabilitative needs to lengthen a sentence. *Tapia*, 2011 WL 2369395, at *3 n.1. Moreover, we have not pronounced on the question.[4] In that situation, when there is no binding precedent on a question on which there is a circuit split, an alleged error is not "clear." If we had confronted the question, we might have gone either way, so the error would not "almost certainly result in a remand of the case." The error was not correctable under rule 35(a), and Henderson's motion failed to preserve the error. We must therefore review for plain error.

Tapia established that it is error for a court to "impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation." *Tapia*, 2011 WL 2369395, at *9. Henderson cannot show that the error in his case was plain, however, because an error is plain only if it "was clear under current law *at the time of trial*." *United States v. Jackson*, 549 F.3d 963, 977 (5th Cir. 2008) (emphasis added). At the time of trial, the Supreme Court had not yet decided *Tapia* and, as we have just explained, we had not yet addressed the question. Where we have not previously addressed a question, any error cannot be plain.[5]

The judgment of sentence is AFFIRMED.

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[4] In *United States v. Giddings*, 37 F.3d 1091 (5th Cir. 1994), we held only that a court could consider a defendant's rehabilitative needs when sentencing him to imprisonment upon revocation of supervised release. Our decision in *United States v. Lara-Velasquez*, 919 F.2d 946, 953-57 (5th Cir. 1990), held only that the court can consider rehabilitative potential as a mitigating factor within an appropriate range of punishment, but not necessarily as a reason for a sentencing enhancement.

[5] *See United States v. Vega*, 332 F.3d 849, 852 n.3 (5th Cir. 2003) ("We conclude that any error by the district court in this regard was not plain or obvious, as we have not previously addressed this issue." (citing *United States v. Calverley*, 37 F.3d 160, 162-63 (5th Cir. 1994) (en banc))).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA	CRIMINAL ACTION NO. 09-111
VERSUS	JUDGE S. MAURICE HICKS, JR.
ARMARCION D. HENDERSON	MAGISTRATE JUDGE HORNSBY

MEMORANDUM ORDER

Before the Court is a Rule 35(a) Motion to Correct a Sentence for Clear Error (Record Document 43) filed by Defendant Armarcion D. Henderson ("Henderson"). Defense counsel argues that it was clear error for the Court to sentence Henderson to 60 months incarceration, which was above the advisory guideline range of 33-41 months, because increasing a sentence to accommodate a rehabilitation programs violates 18 U.S.C. § 3582(a). Defense counsel further asks the Court to clarify its intention to give Henderson credit for the time he has spent in federal custody beginning June 17, 2009. The United States of America ("the Government") opposed the motion. See Record Document 48. For the reasons which follow, the motion is **DENIED**.

Federal Rule of Criminal Procedure 35(a) provides:

> Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

F.R.Cr.P. 35(a). Rule 35(a) is "intended to be very narrow" and extends only to those "errors which would most certainly result in remand of the case to the trial court for further action." U.S. v. Bridges, 116 F.3d 1110, 1112 n. 3 (5th Cir. 1997).

The rule is not meant to afford the district court "the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the [district] court to simply change its mind about the appropriateness of the sentence." Id.

The Fifth Circuit has also concluded that Rule 35(a)'s explicit time limit is jurisdictional, meaning the district court lacks jurisdiction to correct its original sentence beyond the limitation period set forth in Rule 35(a). See U.S. v. Lopez, 26 F.3d 512, 518-519. The time period set forth in the rule is "strictly construed." Bridges, 116 F.3d at 1112. In Bridges, the Fifth Circuit stated:

> We must note that the district court's modification of Bridges's sentence occurred approximately 50 days after the imposition of the initial sentence, clearly outside the seven-day window [now fourteen-day window]. Thus, we conclude that the district court lacked jurisdiction to resentence Bridges.

Id.

Under Rule 35(c), "sentencing" is defined as "the oral announcement of the sentence." F.R.Cr.P. 35(c). The oral announcement of the sentence in the instant matter occurred on June 2, 2010. See Record Document 44. Thus, the undersigned no longer has jurisdiction to correct any alleged error in Henderson's sentence pursuant to Rule 35(a), as almost sixty days have passed since the oral announcement of sentence.[1] Defense counsel conceded as much in the reply, stating:

> Less clear is the question of whether the district court has jurisdiction at this point to change any part of defendant's sentence. . . . Defendant

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[1] Even if the Court had jurisdiction to consider Henderson's Rule 35(a) motion, his request for clarification regarding credit for time spent in federal custody prior to sentencing would fail. This claim relates to the execution of Henderson's sentence, not a correction of the sentence itself. See U.S. v. Giddings, 740 F.2d 770, 771 (9th Cir. 1984).

> concedes it is probably too late for the district court to make any modification to his sentence. It will be left to the Fifth Circuit.

Record Document 52 at 4.

Accordingly,

IT IS ORDERED that the Rule 35(a) Motion to Correct a Sentence for Clear Error (Record Document 43) filed by Defendant Armarcion D. Henderson be and is hereby **DENIED**.

THUS DONE AND SIGNED, in Shreveport, Louisiana, this 30th day of July, 2010.

/s/ S. Maurice Hicks, Jr.

S. MAURICE HICKS, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-30571

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARMARCION D. HENDERSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana

[Filed Dec. 15, 2011]

ON PETITION FOR REHEARING EN BANC

Before SMITH, SOUTHWICK, and GRAVES, Circuit Judges.

PER CURIAM:

The court having been polled at the request of one of the members of the court, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

In the en banc poll, 7 judges voted in favor of rehearing (Stewart, Dennis, Elrod, Southwick, Haynes, Graves, and Higginson), and 10 judges voted against rehearing (Jones, King, Jolly, Davis, Smith, Garza, Benavides, Clement, Prado, and Owen).

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

HAYNES, Circuit Judge, joined by DENNIS, Circuit Judge, dissenting:

I respectfully dissent from the court's decision to deny rehearing en banc. Two issues raised by the panel's opinion merit the full court's attention: (1) the nature of the error that can be corrected under Federal Rule of Criminal Procedure 35(a); and (2) the timing of when the "obviousness" of plain error is judged – at the time of the error or at the time of the appellate decision.

I.

On the first issue, while the panel cites the appropriate standard – "errors which would almost certainly result in a remand of the case to the trial court for further action" – it applies this standard in a way that puts the opinion at odds with our own precedent, *Watkins*, and that of other circuits. Federal Rule of Criminal Procedure 35(a) provides that "[w]ithin 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." FED. R. CRIM. P. 35(a). The Advisory Committee's notes provide that "[t]he authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the

sentence, that is, errors which would almost certainly result in a remand of the case to the trial court . . . ." FED. R. CRIM. P. 35 advisory committee's note.[1]

The Advisory Committee's notes also explain that Rule 35(a) was intended to codify the results in *United States v. Cook*, 890 F.2d 672 (4th Cir. 1989), and *United States v. Rico*, 902 F.2d 1065 (2d Cir. 1990), subject to a more stringent time requirement (now 14 days) for correcting sentencing errors. FED. R. CRIM. P. 35 advisory committee's note; *see also United States v. Ross*, 557 F.3d 237, 239-41 (5th Cir. 2009). In *Cook*, the appellate court upheld the district court's decision to amend a sentence that was not authorized under the sentencing guidelines as they existed at the time. 890 F.2d at 675. Similarly, in *Rico*, the Second Circuit upheld the district court's decision to correct a sentence that mistakenly applied a plea agreement. 902 F.2d at 1068. Thus, Rule 35(a) is intended to allow a district court to correct a sentence that was unlawful. *See Cook*, 890 F.2d at 675; *Rico*, 902 F.2d at 1068; FED. R. CRIM. P. 35 advisory committee's note. However, "[t]he subdivision is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence." FED. R. CRIM. P. 35 advisory committee's note.

Other than the panel's opinion, only one published Fifth Circuit case has addressed whether a Rule 35(a) motion can preserve error. *See United States v. Watkins*, 450 F.3d 184 (5th Cir. 2006) (per curiam). In that case, the defendants

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[1] This note addresses former Rule 35(c); however, the substantive provisions of Rule 35(c) were moved to subsection (a) in 2002. Therefore, earlier analyses of subsection (c) now apply to subsection (a).

filed a timely Rule 35(a) motion to raise their claim that application of a firearm adjustment to their sentences would violate their Sixth Amendment rights. *Id.* at 185. They had not raised that point of error before the district court announced their sentences. *Id.* Our court concluded that their Rule 35(a) motion was sufficient to preserve the error. *Id.*

In distinguishing *Watkins*, the panel looked beyond the facts set out in the *Watkins* opinion.[2] The underlying record in *Watkins* indicates that the defendants filed a Rule 35 motion because a Supreme Court case issued three days after their sentencing rendered their sentence unlawful. That Supreme Court opinion was issued during the period that the district court could have corrected its error under Rule 35. The panel distinguished Watkins because here, the Supreme Court's opinion in *Tapia v. United States*, 131 S. Ct. 2382 (2011), was issued after the case had already been appealed and after the fourteen-day time period during which the district court could have corrected the error had expired. *Watkins* itself, however, made no such distinction, and I do not think it is appropriate to "go behind" the published opinion to introduce facts not therein expressly relied upon.

Several other circuits have indicated that Rule 35 permits a district judge to correct errors of law. *See Cook*, 890 F.2d at 675 (noting that the district court could correct a sentencing error because the original sentence "was not a lawful one"); *Rico*, 902 F.2d at 1068 (upholding a sentencing modification because the original

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[2] In discussing this issue, *Watkins* stated: "The defendants were sentenced before the mandatory provision of the Sentencing Guidelines were modified and rendered advisory by the United States Supreme Court in [*Booker*]. . . . The defendants first raised their Sixth Amendment claim in a timely Fed. R. Crim. P. 35(a) motion, after the district court had orally pronounced the defendants' sentences. We conclude that they preserved the error." 450 F.3d at 185.

sentence was an "illegal sentence"); *United States v. Himsel*, 951 F.2d 144, 147 (7th Cir. 1991) (noting that "the district judge had authority to vacate [a defendant's] first sentence if that sentence was illegal"); *United States v. Quijada*, 146 F. App'x 958, 971 (10th Cir. 2005) (unpublished) (concluding that a mistake or violation of the law was clear error). The panel opinion represents a divergence (if not a split) from those cases, worthy of the full court's consideration.

Moreover, it would seem odd not to interpret "clear error" to mean "legal error." If the district court could not correct a legal error, Rule 35's "other clear error" would seem to have little meaning since "arithmetical" and "technical" are already listed. If this court concludes that "clear error" means "legal error," then the district court would have had the authority to correct Henderson's sentence at the time Henderson filed his Rule 35(a) motion. Even under the law as it existed at the time of Henderson's Rule 35(a) motion, Henderson's sentence would likely have been considered unlawful. Certainly, *Tapia* makes clear that it is. Additionally, this is not a situation where the district court would have simply "changed its mind" or made a different discretionary call about Henderson's sentence, as it could have found that the sentence originally imposed was unlawful under 18 U.S.C. § 3582(a).

Thus, practically speaking, it makes little sense not to construe Rule 35 to permit correction of legal errors within the 14 day period. One could construe the panel opinion to mean that even though the district court realizes a legal error, the parties must still go through a time-consuming and expensive delay to fix it. Rule 35's strictures seem more directed to avoiding "flip-flopping" than to avoiding

correction of legal errors. It would seem strange that a point of legal error actually raised to the district court and able to be ruled upon by that court while the court still was within the time for correcting the error[3] would be considered the same way as a point never raised at all in the district court. Therefore, I would recommend concluding that Henderson's Rule 35(a) motion preserved the point of error adequately, and this court should review Henderson's claim de novo. *United States v. Oliver*, 630 F.3d 397, 413 (5th Cir. 2011) (noting that an issue raised and rejected in the district court is reviewed de novo), *cert. denied*, No. 11-5508, 2011 U.S. LEXIS 8503 (Nov. 28, 2011). Under a de novo standard of review, Henderson would be entitled to a new sentencing hearing.

II.

If the panel correctly determined that the Rule 35(a) motion did not preserve the error, then the question is raised whether the "obviousness" of the error made is judged at the time of the error or at the time of appeal. The panel opinion, with little discussion, concludes that error is judged at the time of the proceeding in question (here, pre-*Tapia*, at the sentencing hearing). In so doing, the panel opinion does not acknowledge either our intra-circuit split or the inter-circuit split on this question. To understand this issue, a bit of history is necessary. The Supreme Court established in *Johnson v. United States*, 520 U.S. 461, 468 (1997) that "where

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[3] The sequence of events in this case was that the sentencing hearing took place, eight days later Henderson filed his motion, two days later the court entered a written judgment of conviction and sentence containing the sentence announced at the oral hearing. Thereafter, the court ordered briefing on the Rule 35(a) motion before concluding that it could not grant the motion because, by the time it ruled, more than fourteen days had passed. Whether or not that is true, I conclude that the district court erred by not granting the motion within the fourteen days in light of Henderson's timely motion.

the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration."

The Government argued in this case that "if the law at the time of trial is not settled, it is not enough that the error be plain at the time of appellate consideration." The Government cites no authority for its contention[4]; instead, it simply assumes that because the Supreme Court stated that "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration," *Johnson*, 520 U.S. at 468, the converse of that statement must also be true. However, the issue is not nearly so clear, as the Supreme Court has left open the question of whether plain error would be established "where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified," *United States v. Olano*, 507 U.S. 725, 734 (1993), and our sister circuits have split over whether *Johnson* applies to the plain error analysis when the law was unclear at the time of trial and later becomes clear. The Ninth and District of Columbia Circuits hold that if the law is unclear at the time of trial and later becomes clear, the exception laid out in *Johnson* does not apply, and the error is evaluated based on the law as it existed at the time of trial. *See, e.g., United States v. Gonzalez-Aparicio*, 648 F.3d 749, 757 (9th Cir. 2011) ("When the state of the law is unclear at the time of trial and is then clarified by subsequent authority, the district court's

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[4] The Government's citation to *Puckett v. United States*, 556 U.S. 129, 129 S. Ct. 1423 (2009), adds little to the discussion, as *Puckett* did not address when plain error is evaluated. The Government concludes that because *Puckett* states that for an error to be plain, it "must be clear or obvious, rather than subject to reasonable dispute," *id.* at 1429, that means that "if the law is unclear at the time of trial . . . the reviewing court considers the status of the law at the time of trial."

error is still not considered plain. . . . Therefore, plain error 'normally means error plain at the time the district court made the alleged mistake.'"); *United States v. Mouling*, 557 F.3d 658, 664 (D.C. Cir.) ("We therefore hold that where, as here, the law was unsettled at the time of trial but becomes settled by the time of appeal, the general rule applies, and we assess error as of the time of trial."), *cert. denied*, 130 S. Ct. 795 (2009).

In contrast, the First, Second, Sixth, and Eleventh Circuits hold that *Johnson* applies whether the law was clear or unclear at the time of trial; the plainness of the error is always evaluated at the time of appellate review. *See, e.g., United States v. Crosgrove*, 637 F.3d 646, 656-57 (6th Cir. 2011) ("However, the requirement that the error be plain means 'plain under current law.' . . . For plain error review, current law 'is the law as it exists at the time of review.'"); *United States v. Gamez*, 577 F.3d 394, 400 (2d Cir. 2009) (per curiam) ("A court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law. . . . Whether an error is 'plain' is determined by reference to the law as of the time of appeal." (internal quotation marks and citations omitted)); *United States v. Ziskind*, 491 F.3d 10, 14 (1st Cir. 2007) (citing *Johnson* for the proposition "that error is plain if the law is clear at the time of direct appellate review, even though governing law was unclear at time of trial"); *United States v. Underwood*, 446 F.3d 1340, 1343 (11th Cir. 2006) (noting that "even though the error was not plain at the time of sentencing, the subsequent issuance of [a Supreme Court opinion] establishes that the error is plain at the time of appellate consideration").

We have not previously squarely addressed this issue where the timing of when the "plainness" was judged was critical; however, our decisions are in something of a disarray on this point. Several opinions, including the panel's opinion in this case, have held that the court considers the law at the time of trial when determining whether an error is plain. *See, e.g., United States v. Henderson*, 646 F.3d 223, 225 (5th Cir. 2011) ("[A]n error is plain only if it was 'clear under current law *at the time of trial*.'" (quoting *United States v. Jackson*, 549 F.3d 963, 977 (5th Cir. 2008))); *United States v. Garcia-Rodriguez*, 415 F.3d 452, 455 (5th Cir. 2005) ("'Plain' is synonymous with 'clear' or 'obvious,' and at a minimum, contemplates an error which was clear under current law at the time of trial."); *United States v. Hull*, 160 F.3d 265, 272 (5th Cir. 1998) (same). Other opinions have concluded that *Johnson* established that the court considers the error at the time of appeal in deciding whether it is plain. *See, e.g., United States v. Bishop*, 603 F.3d 279, 281 (5th Cir.) ("We determine whether an alleged error is plain by reference to existing law at the time of appeal."), *cert. denied*, 131 S. Ct. 272 (2010); *United States v. Gonzalez-Terrazas*, 529 F.3d 293, 298 (5th Cir. 2008) ("[T]he error need only be plain at the time of appellate consideration."). We have not squarely addressed the precise question of whether *Johnson* applies to the plain error analysis when the law was unclear at the time of trial and later becomes clear.

Our earliest discussion of this issue applying the *Olano* formulation of plain error (decided prior to *Johnson*), judged the error at the time of appeal. *United States v. Knowles*, 29 F.3d 947 (5th Cir. 1994). Where "two previous holdings or

lines of precedent conflict, the earlier opinion controls and is the binding precedent in this circuit." *United States v. Wheeler*, 322 F.3d 823, 828 n.1 (5th Cir. 2003) (internal quotation marks omitted). The panel opinion fails to address *Knowles* in light of this precedent or reconcile our conflicting precedents. For this reason, I recommend en banc consideration of this issue to provide clarity on when plain error should be evaluated.

If our court were to follow the First, Second, Sixth, and Eleventh Circuits and hold that plain error is always evaluated at the time of appeal, the district court's opinion would be reversed. The Supreme Court's decision in *Tapia* establishes that at the time of appeal, the district court's error was plain. I submit that Henderson easily meets the other requirements for plain error because the district court, in granting a longer sentence, considered a factor the Supreme Court has stated is an impermissible consideration.

Whichever way this court ultimately would come out on the "timing issue," it is worthy of the full court's attention. We deal almost daily with issues of plain error, and it is certainly not an unusual occurrence for a claim of plain error to be made where the law was unclear at the time of the trial court's decision but is clear by the time of appeal. *See, e.g.*, *United States v. Newson*, No. 11-10073, 2011 U.S. App. LEXIS 23181, at *2-3 (5th Cir. Nov. 17, 2011) (per curiam) (unpublished) (noting that "the lack of a published opinion from this court at the time of the district court proceedings rendered any [error] neither clear nor obvious legal error"); *United States v. Gloria*, 2011 U.S. App. LEXIS 18589, at *4 (5th Cir. Sept. 7, 2011)

(per curiam) (unpublished) (addressing a different sentencing issue and judging plain error at the time of sentencing); *United States v. Graves*, 409 F. App'x 780, 781 (5th Cir. 2011) (per curiam) (unpublished) (addressing such a situation on habeas review and noting that "it is enough that the error be plain at the time of appellate consideration" (internal quotation marks omitted)). How we address such a situation should be uniform. Without doubt, Henderson was sentenced based upon an impermissible consideration. Given the discord within our own circuit (and that among our sister circuits), I submit that the full court should resolve this question. Because it fails to do so here, I respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-30571

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARMARCION D. HENDERSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana

[Filed Jan. 30, 2012]

ON PETITION FOR REHEARING

Before SMITH, SOUTHWICK, and GRAVES, Circuit Judges.

PER CURIAM:

The petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
JERRY E. SMITH

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA	*	Criminal Action
	*	No. 09-111
vs.	*	
	*	Shreveport, Louisiana
ARMARCION D. HENDERSON	*	June 2, 2010
	*	2:30 p.m.

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Sentencing

Certified transcript of proceedings held before the Honorable S. Maurice Hicks, Jr., United States District Judge.

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THE COURT: All right. Now let's deal with the sentencing memorandum that was filed today.

It appears to the Court that the most important request out of that is to ask for credit for time served. It appears to the Court that he's been in custody since January 13, 2009, having been held in Claiborne Parish from January to July, 2009. A federal detainer was then placed on him, as this case was picked up and prosecuted by the U.S. Attorney's Office in July of 2009.

Accurate so far, Ms. Gilley?

MS. GILLEY: Yes, Your Honor.

THE COURT: Mr. Gillespie, do you contest that?

MR. GILLESPIE: Your Honor, I believe he was first in federal court on June 17, 2009.

THE COURT: June 17?

[8] MR. GILLESPIE: Yes, sir. And he was arrested by the Claiborne authorities, my notes indicate, January the 19th of 2009. He wasn't in state court custody – there was also a parole violation hold, Your Honor, based on –

THE COURT: And that was by the State –

MR. GILLESPIE: Yes, sir.

THE COURT: – at this point.

He's subject to revocation on that proceeding, as I understand it.

MR. GILLESPIE: He is, Your Honor. I called Claiborne Parish today, but I did not inquire – I was inquiring about the status of the felon with a firearm charge to make sure that we're – to determine whether it was dismissed already or they would dismiss it as they had agreed. It has not been dismissed, I've been assured it will be dismissed as soon as they get a copy of your judgment.

THE COURT: All right. The request is that – or the contention is that U.S. Sentencing Guideline Section 5(g)(1.3)(B) allows the Court to impose an imprisonment sentence on the current offense to run concurrently with his prior undischarged term in Claiborne Parish.

Here's where I have difficulty with that, Ms. Gilley. He doesn't have an undischarged term in Claiborne Parish. Had his sentence been revoked – or had his parole been revoked, he would then have an undischarged term.

[9] In looking at the way that this fits together, there is an application note to subsection C, and under subsection C's application note to this particular citation by you to the Guidelines is paragraph C, that the situation is, in fact, that this sentence, in fact, could run consecutive to the sentence imposed for the revocation.

We don't have a revocation pending. We have only a petition for revocation, if you will, pending. There is no undischarged term and – within the ambit of the section of the Guidelines that you referred to. That's my problem.

And at this particular point, I will accept at face value Mr. Gillespie's assertion that he expects that the pending state charges will be dropped as soon as the authorities receive a copy of the judgment of this court with respect to the sentencing today.

Now, any comment? That's how I see this coming down.

MS. GILLEY: Your Honor –

THE COURT: She goes first, Mr. Gillespie.

MR. GILLESPIE: Yes, sir.

MS. GILLEY: I agree that the – the problem I had – and I found it very – a gray area. Because I was pondering for months whether I should go ahead and work with the Claiborne Parish people to revoke that, in which case he may have already gotten credit for time served and then there would be no undischarged sentence, so there would be nothing; or [10] leave it open with the possibility that it might be interpreted to be an undischarged sentence because there's something that

is going to happen when they finally have that hearing on the motion to revoke the probation.

So I was really in a quandary, because it was very clear that if I actually had it revoked and they gave him credit for time served, then he was done, then there would be nothing to attach this to and there would be nothing for me to invoke the 5(g).

THE COURT: All right. Mr. Gillespie?

MR. GILLESPIE: Your Honor, I don't know the status of the parole – probation violation – or as I understand it, it's been held open pending resolution of this case or – either in state or federal court.

THE COURT: That's the Court's understanding as well.

MR. GILLESPIE: Yes, sir. And the agreement with Jim Hatch, who is the assistant D.A. in connection with this case, is he will move to dismiss the same charges we have here, felon with a firearm. But I don't think that that will stop the state court judge from ruling on his – the petition –

THE COURT: That's either Judge Fallin or Judge Clason, either a "he" or a "she."

MR. GILLESPIE: Yeah. I don't know which judge it is, Your Honor.

THE COURT: I don't either.

[11] MR. GILLESPIE: But, again, my suggestion is we have a certain date that he appeared in federal court, and that date is June 17.

THE COURT: Denise, would you pull up on our system the docket sheet in this case.

MS. GILLEY: If I might, Your Honor?

THE COURT: Yes.

MS. GILLEY: Another issue that I had with this is that the sentence that he would be revoked on was a three-year sentence, and he served about 17 months already. So that's why I thought there would be a good chance that that "credit for time served and call it complete" was out there.

THE COURT: I'm reluctant to tread on the decision of the state court in this particular case. If there wasn't a true undischarged term, that would be one thing. In this instance, even though the charge – I'll call it the "twin charge" on the firearm, state level and federal level. Assuming that this judgment from this court arrives with the prosecutor in Claiborne Parish, if that prosecutor dismisses this charge – or excuse me, the state charge, then the matter of the revocation is still pending without any assurance of resolution. Am I understanding that correctly, Mr. Gillespie?

MR. GILLESPIE: Yes, sir.

THE COURT: Those are two independent issues. The motion and order for hearing to revoke probation in the Second [12] Judicial District Court, Claiborne Parish, Judge Clason, is signed on January 13, 2009. The order is signed on January 15, 2009, so that's the start date of the proceedings, period.

With respect to the record in this proceeding, the initial appearance was set for June 17, 2009, and was accomplished on that date by this presiding judge, in the absence of Judge Hornsby.

So the federal case begins with the 17th of June, 2009. The state case begins January 15, 2009, per the order.

The issue still left to be resolved and which will be the decision of the state court is to whether the sentences run concurrently or consecutively. And I am the first sentencing judge arising out of the problems that your client has gotten himself into, and I'm reluctant to tread on the authority of the state court in making the ultimate decision on the pending probation revocation or parole revocation, whichever it may be.

MS. GILLEY: It's probation, Your Honor.

THE COURT: – to make that decision for her or him, whether it's Judge Fallin or Judge Clason. And that's kind of where we are right now.

I have no problem in making a recommendation that this individual participate in some level of drug rehab program while incarcerated. I do not think he is going to be in federal custody long enough to qualify for participation in the so-called one – excuse me, 500-hour treatment program. He may [13] be in the system long enough for the so-called 100-hour drug treatment program. And there are waiting lists on both of those.

Here's one other little wrinkle. The Bureau of Prisons has a sufficiently high enough rate of success in their drug treatment programs, but there needs to be ade-

quate time for them to work. If I were to give him credit for time served – that is, the interval between the order and/or the arrest made within a couple of days of each other in January of 2009, to June – he may not have enough time to even complete the 100-hour program. So it works against him.

Because he needs the drug use. He's had a fog of marijuana for a long time. And I don't deny that there is a logical and easy connection to make between his criminal activities and drug use. His brother stayed on the path; your client didn't, and it's because of the drug use that he messed up his life. And I think he could be playing basketball in Europe with his brother, except for the drug use. And that's a problem. That's another consideration to take into account.

I am in the position of considering how best to assist him with obtaining a drug treatment program, but I cannot require the Bureau of Prisons to provide him with drug treatment rehab programming. I can only recommend it to them.

But I can almost assure you that because of the waiting list for those programs that have developed – because [14] not every facility has each of those programs or either of those programs. I don't know whether he's going to be housed at a facility that even offers that.

I've seen this in Laredo, Texas, when I sat on dockets down there before. And it's not only a gray area, it's a difficult area. Because for me to help him, I have to deny credit for time served in order to give him a long enough time in the federal system to complete the 100-hour program. There is no equivalent in the state system.

And that's a concern that I have, and that falls to me to make that decision. I simply posit that wrinkle, if you will, to be considered in the overall sentencing context of what we face here today.

And it is a gray area, and I think I'm accorded fairly wide discretion in making those kinds of calls based on what I see in this record. I don't think there's any question that when BOP reviews this Presentence Report, they're going to see drug use all over it. And he obviously, if there's time, would benefit from what the Bureau of Prisons has.

Wrinkle No. 2: I can't guarantee he'll finish the drug treatment program or even qualify for enrollment based on the waiting list, even if I don't give him credit for time served. That's for whatever "X" number of months he's going to be confined. I still can't guarantee that he'll go through the program.

[15] And certainly I can't guarantee he will successfully finish the program once he starts it. That's up to him. And that's wholly within his process of deciding what he wants to do and who he wants to try to be when he's out of prison – state or federal, or both.

And those are the kinds of decisions that I puzzled over a long time. Because he is a young man – 26. And I am convinced, Ms. Gilley, if he doesn't get a hold of his drug program right now, he will be one of the people in the future whose life will be thrown away and he'll face perpetual incarceration, which I think is absolutely the wrong thing for this young man to fall into.

I mean, it's obvious he didn't exercise judgment in what's right and what's wrong, what should I do, what shouldn't I do. And that judgment may have been clouded by drugs when this "scheme" or "promise" or "pact" or whatever you want to call it was carried out. He wasn't thinking.

And I trust that you have explained to him just how broad the definition is of "possession" under federal statutes as related to firearms.

That's where I am on this. Those are the considerations that I have to address that I see that are present in this particular case. And this is not a unique case, but it falls into the category of the "I don't see this very often" kind of case. But when it does, it makes me [16] concerned about what I can do to help the defendant get his life back on track.

And it may be that it's a longer sentence and a denial of that particular credit-for-time-served request. Not out of a sense of punishment, but out of a sense of "I'm not helping him here." I need – whatever he was in state custody, I'm going to leave up to the state. Federal custody begins when he was brought in. And under the Guidelines, he's looking at 33 to 41 months.

Are there other considerations? I can click into a 3553(a) consideration immediately (snaps fingers) for the need for drug rehabilitation treatment to occur. And I can put him there for a non-Guideline sentence longer than the Guideline sentence to be sure that he gets one of those programs.

Now, I am informed that it takes a minimum of 36 months once he's in BOP custody to qualify for one of those drug treatment programs. And we've already

chewed up a bunch of time with him cooling his heels in state and federal custody. And with the federal detainer operating as of 6/17/2009, we're essentially a year into that sentence. I'm already potentially below the time that I need for him to qualify for participation in that program.

Here's my dilemma. Do I put him in longer to help him – because he needs that treatment – under 3553(a) and those factors that are set forth there, or do I shorten his [17] sentence just to get him out of the system more quickly?

I will tell you, from my perspective, it makes more sense from this individual's viewpoint of trying to get his train that has derailed back on a track – hopefully the right one. But, obviously, he's not equipped enough with respect to potential drug addiction, much less substance abuse, to really give me a good feeling that he ought to be just let go sooner. And that's my concern.

I'll be happy to hear your comments, but I wanted to share with you how I look at this and how – I don't have a responsibility to help him, but it's a factor I need to consider. And if I can keep him there long enough to get him through those programs, I will have done all that I can do and all that the system can do to help get him on a life path that doesn't involve substance abuse. Doesn't mean he won't, but he's got a much better chance of success in those BOP programs than any other program out there. Any comment?

MS. GILLEY: I do, Your Honor. First of all, I would like to thank you for your really extensive analysis of Mr. Henderson here, my client, and your thoughtful analysis into what BOP does once they get our people that we send their way.

I would like to point out a few things.

Mr. Henderson, Armarcion, was actually doing pretty well when he was in – on probation in 2008. He was being [18] drug-screened by Mr. Franklin Evans, his probation officer. He did very well.

THE COURT: And that's recited in your May 6 letter, which I've attached –

MS. GILLEY: Yes, sir.

THE COURT: – to be sure, to the Presentence Report. I understand that.

MS. GILLEY: And he was doing very well. He got a job in late October/ November working as a night security guard. And I attached the W- – his work end-of-the-year W-2 form showing that he actually had done that. And he was being drug-tested for that.

So I think that the purpose of my memo was to show that there were ups and downs in Armarcion's life. He went for periods when he did well, and he was a star basketball player.

THE COURT: I agree. I'm not contesting any of that. I'm trying to –

MS. GILLEY: And then fell off the wagon.

THE COURT: The falling off the wagon is what concerns me. Because at his age, he ought not to be falling off the wagon. And he was doing well at the time that we got into the firearms business, so to speak –

MS. GILLEY: And Your Honor –

THE COURT: – it appears, based on what you submitted to me. But, you know, we've got to have judgment [19] operating on multiple levels – on drugs, on

retrieving firearms for somebody else under some kind of promise or agreement or pact, or whatever the heck it was.

MS. GILLEY: And my purpose –

THE COURT: I can't cure that kind of judgment, and I'm not sure that anybody can cure that kind of judgment except by insight and realization of what adult behavior requires of an individual.

MS. GILLEY: And I think that perhaps Armarcion needs more than just substance abuse. I think the loss of his friends in the tragic accident had an impact –

THE COURT: I mean, there's no psych report indicating what that is. Certainly, it's a tragic incident.

MS. GILLEY: Right. And his brother having left the country. You know, there –

THE COURT: His brother may be back here soon enough to kick his butt.

MS. GILLEY: Your Honor, that's what I wanted to bring up. And I have other people back here that – two people that I would maybe even suggest a couple of minutes of testimony from. Mr. A.D. Williams, he's the octogenarian that I mentioned in there. He has watched this young man grow up. He has been there by his side. He has –

THE COURT: I agree. Your client has all the potential in the world. For right now, his actions have [20] screwed up his life. And the question is, okay, how do we clip it here and let him go on? And to do that, he does need to be equipped

with copying mechanisms and adult decision-making mechanisms that are not clouded by drug use from here on out. I mean, that's the bottom line of what sentencing has to do from the perspective of can I help rehabilitate him into something other than what he was.

And there are not many people with his athletic prowess that simply chose to flush their toilet, flush the toilet and their dreams and their potential down the drain. We're now at life number two. I hope that past is past. By the time he gets out of federal prison, no matter what the sentence is, he's going to be too old to play pro basketball and break in and do it.

MS. GILLEY: And he realizes that, Your Honor. That is –

THE COURT: So that part and phase is over with.

MS. GILLEY: And I –

THE COURT: What is the next phase? And I'll be the first to tell you I don't think your client has the slightest, foggiest idea at this point. But he's got a support system out there, if he'll pay attention to it, of family and friends and a brother to help him out. But none of those people are able to give him or equip him, if you will, with what programming within the BOP can provide, especially on substance abuse.

[21] I would like to believe he can be cold turkey and quit and do it all on his own. It's much harder to get drugs in the state prison where he's currently confined. It's much harder to get drugs in BOP custody with the prison facilities that they have. If he pops up with drugs and he gets caught, I can't help him.

What I'm trying to do is split that difference between what the Guidelines recommendations are and how much time is there left. And right now there's not enough time to get him into a program. Because it's moved from 24 to 36 months over the last two years. There's that many people that not only want to be, need to be in those substance abuse treatment programs.

If I can get him into a 500-hour one, it would be great. He's not going to lop any time off of the sentence because of the firearm problem. You don't get credit for one year off of your sentence if you're in there because of a firearms issue. But you can still pass that successfully and equip yourself for doing something better and doing something different. That's where I am.

MS. GILLEY: Well, your Honor, there's another aspect of the case that has recently developed. It's my understanding that his brother suffered an injury and is not going to be able to continue to play and, in fact, is coming home. I've had emails – a phone call from him, in fact, from wherever he was [22] at the time in Europe, and he expressed to me his desire to be close and stand by his brother and to guide him. Because he won't be going out of the country and doing things. It was his hope that he would be back here.

All of these folks (indicating) are family or friends –

THE COURT: They're part of the support structure that are willing to help, provided he is willing to help himself and can help himself.

MS. GILLEY: And, Your Honor, I think that another aspect of this case is that I think it's a pretty well-known fact that the generation that Armarcion

Henderson is in is maturing at a much slower rate than the generation even 10, 15 years ahead of it. He, at 24, was not as mature as the folks 15 years ahead of him were when they were 24.

I think – and I have spent – and you will see this when I submit my voucher – hours and hours talking with Armarcion, and I have found a very mature young man at this point. I found a different man than I met last July when I was first appointed to represent him. I do believe that he does see the difference now. I think that he has realized that he's just lucky to be alive at this point, considering the path he was on.

He has expressed to me his desire to go back to college, try it again. He would love to be a teacher in the [23] elementary school level. I talked to Mr. Williams, sitting behind me here in the seats, and he said – he has expressed to me the times that he would see Armarcion, when he was in high school, out there on the basketball court working with these youngsters.

Mr. Williams is the head of the Housing and Urban Development Office –

THE COURT: I don't disagree. He's got all the potential in the world. The question is he's off track now, getting back on track and how to do that.

MS. GILLEY: Right. And I really believe that with his family, I think he – they would certainly support him and –

THE COURT: He can't do it until he has substance abuse rehabilitation treatment.

MS. GILLEY: Right. And I think his family, including his brother, is willing to help get him the treatment that he needs.

THE COURT: I'm going to make sure that he gets it, if I can, within the BOP system. What happens in the private systems afterwards – because he's going to be on supervised release after he's out. He screws up with drugs again after he's out and I'm going to find him right back where he's sitting right now, dressed in the same clothing, with you as his lawyer, and then I'll get to be punitive.

[24] I am not trying to be purely punitive with his activities right now. My goal is to try to help him. And under Section 3553(a)(D), it says "to provide the defendant with needed educational-vocational training, medical care, or other correctional treatment in the most effective manner." And if I sentence him to too little, he'll never get that chance again, to be perfectly frank with you.

MS. GILLEY: Well, Your Honor, I think you hypothesize that he won't, but we don't know what his –

THE COURT: I'm not willing to speculate. I've got control over him, Ms. Gilley, right now. I've got him, and I can direct where he goes. And I'm unwilling to turn him over to the private sector without penalty for what he has done.

Now, the penalty under what I need to consider is rehabilitative treatment, substance abuse treatment, and other programming that is going to be available to him during the BOP. But first and foremost is substance abuse treatment.

Was he on the better at the time that all this came down? Yes. Is he cured? No. Is he equipped to be cured on a consistent, long-term basis? In my opinion, no,

not from what I see in my Presentence Report. This has been a long time. I mean, for a kid who is 26, he's had substance abuse programs a long time.

MS. GILLEY: He hasn't had any programs yet, Your Honor.

[25] THE COURT: I mean, sorry, substance abuse for a long time. And when it starts as early as it started with him, it's not that easy to kick. That's where I am right now.

Do you have any closing comments, or does your client wish to address me before –

MS. GILLEY: I have one other comment, Your Honor.

THE COURT: Make it quickly.

MS. GILLEY: Yes, sir. This is in relation to the charge on which he's actually being sentenced. And Mr. Vernon Jackson is here and is prepared to say that, in fact, the reason that Mr. Henderson came and got the gun was that his son, John Michael, and Armarcion had agreed that if John Michael got in jail –

THE COURT: Dumb is dumb, no matter how you look at it, when you've got a criminal record and you handle a firearm.

MS. GILLEY: I understand that, Your Honor.

THE COURT: And I don't care whether it was out of a brotherly love, a sense of forever friendship. He is guilty of the crime that he pleaded guilty to. There is no defense to it. He acted stupidly. Could he have acted better? Yes. Should he have realized that a pact like that was not in his best interest? Yes. Did he? No. That's where we are.

MS. GILLEY: Yes, sir. But the point that I wanted to make is that we're supposed to look at more than just the element – there was no element of the defense that we could [26] make. We pled guilty. The point is, he wasn't getting a gun to go out and rob a bank. He wasn't getting –

THE COURT: It does not matter, Ms. Gilley.

MS. GILLEY: Well, it –

THE COURT: You could argue until 56 extra minutes go by. He is guilty of the crime that he pled to.

MS. GILLEY: We don't dispute that.

THE COURT: It is not an ameliorating factor that he didn't intend to use it. It's a strict liability crime.

MS. GILLEY: I understand. But when sentencing issues arise, I think that it behooves us –

THE COURT: I disagree in this set of circumstances, Ms. Gilley. I whole-heartedly disagree with this.

MS. GILLEY: Yes, sir. I wanted, also, for the purpose of mending fences, to make it known that Mr. Jackson was prepared to go on the stand today and he, at great inconvenience to himself, is here to do that.

THE COURT: I understand. No problem with there at all.

Now, does your client wish to address the Court?

MS. GILLEY: I don't believe so, Your Honor. We had talked about –

THE COURT: He'll waive it?

(Defense Counsel confers with Defendant.)

MS. GILLEY: He will waive allocution.

[27] THE COURT: All right. Allocution is hereby waived.

Mr. Gillespie, any comment by the Government?

MR. GILLESPIE: No, Your Honor. Ms. Gilley, in her memo, says that the – Mr. Jackson placed the weapon on the floorboard of the truck. Mr. Jackson gave it personally to the defendant, and it was placed on the floorboard of the truck. I don't think it has anything to do with the sentencing, but I just – that fact is –

THE COURT: I understand.

All right. What I'm going to do is adopt the factual findings of the probation office as contained in the Presentence Report and the addendum.

So that the record is clear, the Court has considered the May 6 filing, which we currently can't find a record of having found its way into the system. Nonetheless, I have reviewed that. That being the submittal of Ms. Gilley on behalf of her client. It did not contain specific objections to the PSR but did contain a preservation of the right to contest certain facts and also pointed out drug – test results or drug screening results while he was on parole in the state system.

The Court has also considered the memorandum, sentencing memorandum, that was filed and hand-delivered to my office today, and has been taken into account.

Pursuant to the Sentencing Reform Act of 1984, it is [28] the judgment of this Court that the defendant, Armarcion D. Henderson, is hereby committed to the custody of the Bureau of Prisons for a term of 60 months as to the single count.

This sentence was selected after consideration of the defendant's personal history, his characteristics, prior criminal record, his need for substance abuse treatment within the Bureau of Prisons program – hopefully the 500-hour program, because it will be the best available for him. The government is going to pick up that cost.

When his brother returns and wants to keep an eye on him, he is free to enroll him in any other care facility that's available after his confinement sentence.

I want the record to reflect that this sentence is a 3553(a) sentence, particularly under subparagraph (2)(D), because this defendant needs training, he needs counselling, and he needs substance abuse treatment within the confines of that system.

I will not credit the time served from the time he was arrested on the state charges to the time of the federal detainer. I want him available for as long as possible within the Bureau of Prisons system to be sure that he gets treatment. Any shorter period of time – I will grant him credit, of course, from the time of the federal detainer until now, which is almost a full year. So we're already down to 49 months in custody in a BOP facility, because it will be designated [29] sometime in the next month. But I've got to give him that length of time to do the programming

and the treatment and the counselling that this defendant needs right now. And that is the reason for that sentence under 3553(a)(2)(D).

After release from imprisonment, Armarcion Henderson is placed on supervised release for a term of 3 years as to the single count. All standard conditions of this court are applicable.

In this instance, I'm going to attach a special condition to your supervised release, Mr. Henderson. As a special condition of your supervised release, you are ordered to participate in a substance abuse treatment program as directed by the U.S. Probation Office, to include Antibuse, drug surveillance, if indicated, and/or inpatient treatment, as deemed necessary by the probation officer.

Within 72 hours of your release from custody of the Bureau of Prisons, you shall report in person to the U.S. Probation Office in the district into which you are released.

While on supervised release, you shall not commit another federal, state, or local crime, and shall comply with all standard conditions adopted by this court. You shall not possess a firearm, ammunition, or a destructive device while you are on supervised release.

Due to the confinement sentence, no fine is ordered. The defendant, however, is ordered to pay $100 to the Crime [30] Victim Fund for the single count, payable immediately to the U.S. Clerk of Court.

The defendant is remanded to custody of the U.S. Marshals Service.

I need to notify you of your right to appeal, Mr. Henderson. In the event that you file an appeal under Section 3742 of Title 18 of the U.S. Code for a review of your sentence, the clerk is directed to transmit the Presentence Report under seal to the Court of Appeal.

Ms. Gilley, it will fall upon your shoulders to timely file said notice of appeal.

I need to tell you that there is a short period of time for accomplishing that – approximately 14 days. Ms. Gilley will step you through that process and will counsel with you, Mr. Henderson, about the advisability of filing an appeal in connection with any issue raised during the course of this proceeding, including sentencing.

Is there any reason why that sentence as stated should not be imposed, Ms. Gilley?

MS. GILLEY: Procedurally, no, Your Honor.

THE COURT: All right. Mr. Gillespie, any reason why that sentence as stated should not be imposed?

MR. GILLESPIE: No, sir.

THE COURT: The sentence is hereby imposed as stated. Any further business to come before this Court this [31] afternoon?

(No response.)

THE COURT: Hearing nothing, we are adjourned.

PETITIONER'S BRIEF

No. 11-9307

In The
Supreme Court of the United States

ARMARCION D. HENDERSON,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER ARMARCION D. HENDERSON

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QUESTION PRESENTED

Whether for purposes of Rule 52(b) review, when the governing law is unsettled at the time of trial but settled in the defendant's favor by the time of appeal, should an appellate court apply a "time-of-appeal" standard or "time-of-trial" standard in assessing plainness of error.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 646 F.3d 223.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2011. A petition for an en banc hearing was denied on December 15, 2011 (Pet. App. 8a-18a) and a petition for a panel rehearing was denied on January 30, 2012 (Pet. App. 19a). The petition for a *writ of certiorari* was filed on March 14, 2012 and was granted on June 25, 2012. This Court has jurisdiction based on 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Criminal Procedure 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

STATEMENT

Armarcion Henderson (hereafter "Henderson") was indicted for being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). He entered a plea of guilty in the United States District Court for the Western District of

Louisiana on June 2, 2010 and was sentenced to 60 months of imprisonment. The court of appeals affirmed the lower court's judgment on July 18, 2011. Pet. App. 1a-4a. Request for panel hearing was denied on January 30, 2012.

1. On January 13, 2009, Henderson was arrested for being a felon in possession of a firearm and charges were filed in state court. On May 29, 2009, he was indicted in federal court on the same charges. Henderson filed a motion to suppress, a hearing was held on the motion, and it was denied. On February 1, 2010, Henderson withdrew his earlier plea in federal court, entered into a conditional plea of guilty as charged, but preserved his right to appeal the ruling on the motion to suppress. A pre-sentence report (PSR) was submitted to which Henderson had no objections except for those related to his motion to suppress. The sentencing guideline range was 33-41 months. A sentencing hearing lasting nearly one hour took place on June 2, 2010.

2. Despite the fact that the PSR stated there was nothing which would warrant a departure from the recommended sentencing guidelines and no reasons were ever supplied by the trial court judge prior to the hearing, the court sentenced Henderson to 60 months of imprisonment. The sentencing judge took great care to note that the extra time was not intended as additional punishment but was to ensure Henderson was in the Bureau of Prison system long enough to enroll in and complete the 500-hour drug treatment program. Pet. App. 2a & 39a-40a. No

specific objection was made by Henderson at the sentencing hearing.

3. Eight days after the sentencing, Henderson filed a motion relying on Federal Rule of Criminal Procedure 35(a) seeking to correct the sentence for clear error. He argued that the district court had violated 18 U.S.C. § 3582(a) which requires the court to "recognize that imprisonment is not an appropriate means of promoting correction and rehabilitation." The district court denied the motion. Pet. App. 5a-7a. Henderson timely filed a notice of appeal. His brief was filed with the Fifth Circuit Court of Appeals on October 18, 2010.

4. While Henderson's case was pending at the Fifth Circuit, this court decided *Tapia v. United States*, 131 S.Ct. 2382 (2011), which held that "a court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation." *Id.* at 2393; *see also id.* at 2385 ("The Sentencing Reform Act precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant's rehabilitation").

5. At the time Henderson was sentenced, the courts of appeals were divided on whether a district court may impose a longer sentence to promote a defendant's rehabilitation. The Fifth Circuit had not yet addressed the issue. Pet. App. 4a & 7a. Less than a month after *Tapia* was decided, the Fifth Circuit affirmed Henderson's sentence. The panel recognized

that Henderson was "correct that district court erred" in "giving him a longer sentence to promote his rehabilitation." Pet. App. 1a. However, the panel held that he could not avail himself of that ruling to prove the error was "clear or obvious" because it was not plain at the time of trial. The court of appeals found the same to be true for application of Henderson's Rule 35(a) motion seeking a correction to his sentence. Pet. App. 4a, citing *United States v. Jackson*, 549 F.3d 963, 977 (5th Cir. 2008). The Court used a Rule 52(b) standard of review despite Henderson's suggested Rule 52(a).

6. Henderson sought both a panel and an en banc rehearing. On December 15, 2011, the court denied en banc hearing by a 10-7 vote over Judge Haynes' published dissent (joined by Judge Dennis). Pet. App. 8a-18a. A panel hearing was denied without comment a month and a half later, on January 30, 2012. Pet. App. 19a.

7. The dissent by Judge Haynes stressed the importance of resolving the issue of *when* the error must be "plain" in order to satisfy the requirement of Rule 52(b). She noted that "[w]e deal almost daily with issues of plain error, and it is certainly not an unusual occurrence for a claim of plain error to be made where the law was unclear at the time of the trial court's decision but it is clear by the time of appeal." Pet. App. 17a.

SUMMARY OF ARGUMENT

The rule at issue did not originate with Congress. It will do little good to seek legislative intent. This Court submitted and adopted each of the rules.

The "plain error" or "forfeited error" of Rule 52(b) has existed within the federal criminal judicial system for over 200 years. Because of our deep and abiding quest for justice, the system has found ways to give the injured and deserving defendant a remedy.

In 1944, the first edition of our Federal Rules of Criminal Procedure was adopted by this Court. With the advent of the Warren Court followed by the Rehnquist Court and now the Roberts Court, as well as by the introduction of the United States Sentencing Guidelines in 1985, Rule 52(b) has become one of the most frequently cited rules in appellate courts.

United States v. Olano established the criteria used in all federal courts for reviewing direct appeals. It requires the appellate court to make four determinations before granting the remedy requested.

Transitional moments have occurred throughout the history of our legal system. These are the periods when changes are happening so fast from either adjudicative or legislative laws that defendants who committed crimes under the previous laws had not seen their cases finalized.

Olano was modified by *Johnson*, 520 U.S. 461 (1997), to allow a remedy for Defendant Johnson.

With *Griffith v. Kentucky*'s (479 U.S. 314 (1987)) mandate to apply all new laws to defendants whose cases were not yet final, use of forfeiture rules came to be a way to slow down the granting of reversals. Some Justices began to question the system of doing so. The theory of retroactivity and forfeiture of rights to complain of error began to develop in tandem. Numerous cases were decided and continue to multiply especially within the context of federal sentences.

Tapia was decided while Petitioner Henderson's case was at the Fifth Circuit. With that decision, Henderson should have had his sentence corrected to eliminate the excess time given for rehabilitation. Because the Fifth Circuit refused to join the majority of the circuits and use a time of appeal standard, Henderson's appeal was denied.

There seems to be no basis for concern of throwing open the prison doors if a time of trial standard is adopted as the correct standard by this Court. This Court should clarify the question where law is unsettled at the time of trial but becomes clear by time of appeal. There is no compelling reason not to do so.

ARGUMENT

I. Examining Rule 52(b) for Legislative Intent Will Not Work in This Instance

The Federal Rules of Criminal Procedure are not the product of legislative committees in which multiple views, agendas, biases, etc. were part of the

creative process. At the request of Congress in 1940 this Court created and adopted what came to be designated as the Federal Rules of Criminal Procedure. "West's Criminal Code and Rules" still begins with a reprint of this Court's order of December 26, 1944, in which it adopted the first portion of those rules and the Chief Justice was authorized and directed "to transmit the Rules as prescribed to the Attorney General and to request him . . . to report these Rules to the Congress. . . ." To be sure, this Court had input from others in drafting and finalizing those first rules. But it was this Court which adopted them as its own and asked Congress to accept them as presented. *See* West's Law, *2012 Revised Edition of the Federal Criminal Code and Rules*, p. 14.

It is noted that Justice Black stated he did not approve of the Court's adoption of the Rules. Nor did Mr. Justice Frankfurter "join in the Court's action." This was not because he disapproved of the rules themselves (to which he "express[ed] no opinion on the merits), but because he believed the Court was not an "appropriate agency for formulating the rules of criminal procedure for the district courts." *Id.* at 15.

Looking back over the years, since the country's beginning, Justice Frankfurter reminded his fellow Justices of days when Court members "rode circuit." This provided them with "intimate, first-hand experience with the duties and demands of trial courts." Beginning shortly after the Civil War, he noted such opportunities became less frequent. By his day they were largely denied the "first hand opportunities for

realizing vividly what rules of procedure are best calculated to promote the largest measure of justice." He found that regrettable because such considerations "are especially relevant to the formulation of rules for the conduct of criminal trials . . . [which] closely concern the public security as well as the liberties of citizens." *Id.* at 15.

Additionally, Justice Frankfurter felt it unwise for the Court to adopt rules which undoubtedly would at a later date be the source of questions of adjudication by the Court. A third reason was apparently equally important to the Justice. He was concerned how the "responsibility for fashioning progressive codes of procedure and keeping them current" might take precious time from the Court's primary duties which no one else could do. *Id.*

Of course, this Court now has Advisory Committees and Standing Committees on the various rules for which it is responsible, but it is, nevertheless, this Court which has been and continues to be responsible for each and every of the sixty Rules which now compose the Federal Rules of Criminal Procedure. There is no legislative body which takes responsibility for them.

In 1966, Mr. Justice Black and Mr. Justice Douglas each dissented from the Order of the Chief Justice on February 28th in which new amendments and additions were to be delivered to Congress. Justice Douglas objected because the rules were to go into effect "without requiring any affirmative consideration,

action, or approval of the rules by Congress or by the President." They each noted specific objections to certain of the amendments and additions. *Id.* at 16-18. The same justices dissented to the Order of April 24, 1972 and the Order of November 20, 1972. Justice Douglas objected again to the Order of April 22, 1974. He was "opposed to the Court being a mere conduit of Rules to Congress since the Court has had no hand in drafting them and has no competence to design them in keeping with the times and spirits of the Constitution." *Id.* at 20.

Rule 52 was never amended until 2002 when the entire Code was amended as part of the "general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules." The changes were intended to be "stylistic only." For Rule 52(b) that meant deleting the words "or defect" after the words "plain error." West's Law, *2012* at 215.

II. Forfeited Error and Exceptions Thereto Have Been an Accepted Part of Our Legal System Since Its Inception

A straight forward reading of Rule 52(b) informs that it is at its core a "forfeiture rule." It would have been particularly helpful if Rule 52(a) and 52(b) would have been titled "Preserved Claims" and "Forfeited Claims," respectively. It would have been easier to remain focused on their individual differences and the importance of their specific words and phrases.

But we have become accustomed to referring to them as the "Harmless Error" and "Plain Error" rules which seems to focus more attention on the error itself and when it became plain as opposed to timing differences between preserved and forfeited error.

Federal criminal convictions have been reviewed by appellate courts and overturned in spite of rules of forfeiture and "plain error" requirements since the early days of our legal system. The valuable works of Professor Toby J. Hytens, former assistant to the Solicitor General will be referred to frequently in this brief. *See* Toby J. Hytens, "Managing Transitional Moments in Criminal Cases," THE YALE LAW JOURNAL, Vol. 115, pp. 922-994 (2006) at p. 945, n. 119.

In *Wiborg v. United States*, 163 U.S. 632 (1896), two shipmates were convicted of leaving the United States for the purpose of conducting a military expedition against a foreign country. Though not raised at trial, the defendants argued insufficiency of evidence at the appellate stage. This Court granted them a reversal. Well before the existence of Rule 52(b), Chief Justice Fuller, writing for the Court, "asserted a power to 'take notice of what we believe to be a plain error' with respect to 'a matter so absolutely vital to defendants.'" *Id.* at 946 n. 121. It is interesting to note that the importance of this power of judicial review is still recognized in Supreme Court Rule 24 which states "[a]t its option . . . the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide." Supreme Court Rule 24(1)(A).

Consider also *O'Neil v. State of Vermont*, 144 U.S. 323, 360 (1892) where a defendant who had forfeited a right was nevertheless granted relief on appeal. Once again doing justice to the defendant trumped the forfeiture of an error at trial. This Court responded to his plea:

> This rule seems to provide for a case like the present, and I do not think we should be astute to avoid jurisdiction in a case affecting the liberty of the citizen. . . . In opening the record . . . we see that a cruel, as well as an unusual, punishment was inflicted upon the accused. . . .

Id. at 360.

Shortly before the Federal Rules of Criminal Procedure came into being, this Court decided *United States v. Atkinson*, 297 U.S. 157 (1936). The case lends further historical perspective to the forfeiture rule as we understand it in Rule 52(b). The Court held:

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.

Id. at 160. As will be discussed later in this brief, the common thread running through these earlier cases was the notion that an injustice should be remedied.

III. In the Past Fifty Years Rule 52(b) Has Become More Widely Used

There was little notice paid to Rule 52(b) and its "plain error review" from 1945 until the 1980s. However, two cases should be noted. *United States v. Frady*, 456 U.S. 152 (1982) is frequently cited for its discussion of whether Rule 52(b) should be applied to petitioners coming before appellate courts on collateral challenge to a criminal conviction brought under 28 U.S.C. § 2255. This is one of the earliest cases where "time" was a significant point of discussion. Justice O'Connor writing for the majority found that "because Rule 52(b) was intended for direct appeal Frady could not avail himself of its benefit while making a collateral attack." *Id.* at 164. There were two concurring opinions and one dissent.

Another noteworthy case in this analysis is *United States v. Young*, 470 U.S. 1 (1985). The issue presented was whether the prosecutor's remarks in closing argument rose to the level of "plain error" such that a reviewing court could act on absent an objection by the defendant at the time of trial." *Id.* at 6. The Court looked to *Atkinson* as "codified in . . . Rule 52(b)" to determine the rule was correctly applied by the Court of Appeals. The Court reversed and found the prosecutor's conduct definitely rising to the level of error, it did not, however, rise to the level necessary to result in a reversal of the conviction. *Id.* at 15-16. The Court's discussion as to how circumscribed the appellate court's authority was on this

issue is seen again in *United States v. Olano*, 507 U.S. 725 (1993).

IV. *United States v. Olano* Established the Standard for Receiving Relief Under Rule 52(b) Error

United States v. Olano, 507 U.S. 725 (1993) sets the framework for Rule 52(b) analysis of plain error relief. The Court began by revisiting the rules already established on the issue of Rule 52(b) "plain error" review: Any right could be forfeited if a defendant failed to timely raise the issue during the trial stage; Rule 52(b) provides a court of appeals a limited and circumscribed right to correct forfeited errors; Rule 52(b) had remained unchanged since originally written and was merely a restatement of existing law when adopted; Rule 52(b) is properly paired with Rule 52(a) which governs preserved or non-forfeited errors; fundamental justice requires courts of appeal to sometimes consider forfeited errors; Rule 52(b) leaves it to courts of appeals to exercise their discretion in deciding whether or not to correct a forfeited error; "the appellate court must consider the error, putative or real," (dare we say unsettled or real?) "in deciding whether the judgment below should be overturned"; the phrase "error or defect" is more simply read as error; and finally, any forfeited error "may be noticed" only if it is "plain" and "affects substantial rights." *Olano*, 507 U.S. at 732.

From these principles the Court set forth the four criteria which are generally referred to as the "four

prongs" of *Olano*'s "plain error" review. In *Olano*, two co-defendants came before the Court seeking corrections in their cases pursuant to Rule 52(b). The case of *United States v. Olano* and *United States v. Gray*, 507 U.S. 725 (1993). Guy Olano and his co-defendant complained that the trial court's permission to the two alternate jurors to be present while the twelve jurors deliberated and reached a verdict violated the rights of the defendants. The court of appeals vacated the convictions finding that the alternate jurors' presence in violation of Federal Rule of Criminal Procedure 24(c) was inherently prejudicial and reversible per se under the "plain error" standard of Rule 52(b). The government sought and was granted writs. This Court held that while the presence of the alternate jurors was plain error, it was not an error that the Court of Appeals could correct under Rule 52(b) because Olano and Gray could not prove they suffered prejudice from the error.

Applying these general principles, the Court then gave us the four criteria which have come to be called the "four prongs" of the *Olano* test for "plain error." The *first* requirement is that there be an actual error. Deviation from a legal rule is "'error'" unless the rule has been waived. The *second* limitation on appellate authority under Rule 52(b) is that the error be "plain." "Plain" is synonymous with "clear" or, equivalently, "obvious." Citing *Young*, supra, and *United States v. Frady*, 456 U.S. 152, 163 (1982). Aware of the dissensus in the legal community as to exactly when the error must be "plain," the Court found that

to be subject to 52(b) correction, "the error must, at a minimum, be clear under current law." It specifically left unanswered the "special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *Olano*, 507 U.S. at 734. The *third* numbered limitation required that the plain error "'affect substantial rights,'" which it noted "is the same language employed in Rule 52(a), and in most cases is meant that the error must have been prejudicial: It must have affected the outcome of the District Court proceedings." *Olano*, *id.*

As to the third prong, the Court makes it clear that in 52(b) it is the defendant who bears the burden of proving an error took place which resulted in harm to a substantial right. This is a subtle shift from Rule 52(a)'s language where once the defendant adequately proved the existence of an error, the burden was on the government to prove the error was harmless. The Court noted it chose not to address that special category of error that can be corrected regardless of proof of substantial harm. This category would include cases in which the error involved a right so basic that any infringement would make it impossible to fairly determine guilt or innocence.

A fourth, though non-enumerated prong, limits a court of appeal from correcting any error unless it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736.

Applying the four criteria to the two respondents Olano and Gray, the Court found the first two criteria were met based on concessions by all parties. Then the court focused on whether the error affected substantial rights within the meaning of Rule 52(b). It found it did not. The dissenting opinion by Justice Kennedy in *Olano,* presents several valuable insights. At page 741, Justice Kennedy compliments the majority in the wording of the opinion relative to burden of proof. Justice Kennedy:

> . . . the Court's opinion is phrased with care to indicate that burden of proof concepts are the normal or usual mode of analysis of error under Rule 52 . . . this gives operative effect to the difference under Rule 52 between those cases where an objection has been preserved and those where it has not.

V. Transitional Moments in Criminal Law Resulted in Modifications to *Olano*

Johnson v. United States, 520 U.S. 461 (1997) is the next case that must be carefully considered in order to resolve Henderson's claim. Joyce Johnson was convicted by a jury of giving false testimony under oath before a Grand Jury thereby violating 18 U.S.C. § 1623. Materiality is an element of that crime. At the time of trial, circuit precedent left it to the trial judge to decide the materiality question and this Court had not yet spoken on the issue. Joyce Johnson did not object to the judge's affirmative finding nor to his instructions to the jury stating the

same. Johnson was convicted and appealed. After her conviction but before her appeal to the Eleventh Circuit, this Court decided *United States v. Gaudin,* 515 U.S. 506 (1995) which dictates that materiality be decided by the jury, not the court. *Id.* at 463. Johnson urged that the Eleventh Circuit not apply the "limited" and "circumscribed" structures of *Olano* to her case because the error of which she complained was "structural" and a "special" case. The appellate court rejected her argument and applied the Rule 52(b) analysis established in *Olano.* The appellate court made no independent finding as to prongs one or two, but assumed arguendo they had been met. Apparently, the appellate court believed a retroactive application of *Gaudin* was appropriate for determination of prongs one and two of *Olano*'s criteria. Regardless, the defendant lost when the third prong of *Olano* was used to determine whether the error had substantially affected her substantial rights. That conclusion was based on "the court's independent review of the record and determination that there was 'overwhelming' evidence of materiality. . . ." *Id.* at 465. Ms. Johnson eventually made it to this Court.

Joyce Johnson relied on a number of cases in which this Court did not apply Rule 52(b) analysis to the petitioners' alleged errors. *Id.* at 465. In those cases this Court referred to the petitioners' errors as "structural." This Court distinguished the cited cases as not having come to the Court by way of a direct appeal from a judgment of conviction in a federal court, and therefore, they were not subject

to the provisions of Rule 52. *Id.* at 466. The Court cautioned against any unwarranted expansion of the Rule or exceptions to the Rule "which we have no authority to make." Citing *Carlise v. United States,* 517 U.S. 416 (1996). Up to this point, all Justices were in agreement. The Rule 52(b) analysis then began. A unanimous Court agreed that because Johnson was still on direct review from a federal conviction, *Gaudin* should be applied retroactively (as required by *Griffith v. Kentucky*), thereby satisfying the first prong of the test. The majority had no doubt that if Johnson's trial had occurred that day, the failure to submit materiality to the jury would be error. They also felt that because petitioner was still on direct review, *Griffith v. Kentucky,* 479 U.S. 314 (1987) required them to follow its directive and apply it to the case before them.

The second prong of the test presented problems. Was the error plain "under current law?" The majority concluded "the error was certainly clear under current law, but it was by no means clear at the time of trial." *Johnson,* 520 U.S. at 467.

Eventually all but Justice Scalia were persuaded by Petitioner's argument that it would be unreasonable to require a defendant to lodge an objection at trial to each and every conceivable issue that was not open to debate in hopes it would be overturned before her case became final. The majority agreed that in this situation (i.e., where the law was clearly against her at trial but clarified by a ruling while the matter was still on direct appeal), it was sufficient that the

error was plain at the appeal stage. The second prong was therefore satisfied. *Johnson*, 520 U.S. 461, provided a further refinement of Rule 52(b) as analyzed in *Olano.*

Johnson, supra, provides a further refinement of Rule 52(b) stating "[i]n a case where the law at the time of trial was settled and clearly contrary to the law at the time of appeal – it is enough that an error be "plain" at the time of appellate consideration." In other words, a petitioner who forfeited an objection can be granted a Rule 52(b) remedy if objecting at the trial stage would have been futile and a clarifying law or adjudication was in place at time of appeal.

Johnson now had the burden of proving her substantial rights had been affected. She argued that the error was "structural" as explained in *Arizona v. Fulminante,* 499 U.S. 310 (1991) because it affected "the framework within which the trial proceeds, rather than simply an error in the trial process itself. *Johnson*, 520 U.S. at 469. The Court chose to "pass" on deciding that question and moved on to the final, third prong. The Court had no problem in finding the record provided overwhelming evidence supporting materiality. Therefore, though there had been error which was plain at the time of appeal, petitioner was not entitled to a Rule 52(b) remedy due to a lack of harm caused by the error.

VI. *United States v. Cotton* Leads the Way for Forfeiture to Overwhelm *Griffith v. Kentucky*'s Mandate

United States v. Cotton, 535 U.S. 625 (2002) is one of the few Supreme Court cases since *Johnson* to address plain error review in the changed-law context. *Cotton* followed the chaos of *Apprendi*. The government conceded that the error (i.e., the trial judge's making findings as to quantity of the drugs involved which resulted in a much lengthier sentence than otherwise could have been imposed) was "plain" because "'the law at the time of trial was settled and clearly contrary to the law at the time of appeal.'" The Court assumed without deciding that the error had affected the defendants' substantial rights, but it nonetheless denied relief under the third *Olano* factor because the evidence of drug quantity was "overwhelming and essentially uncontroverted." *Id.* at 633. In other words, the error caused no harm which otherwise wouldn't have been inflicted.

VII. Justice Stevens Questions the Need to Rethink Retroactivity and Rule 52(b)

A more recent case sheds more insight on Rule 52(b) – *United States v. Marcus*, 130 S.Ct. 2159 (2010). This Court reversed a Second Circuit finding that when reviewing for "plain error" it must reverse "whenever there *is any* possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct," – an error involving *Olano*'s third prong but with a much less

stringent requirement. The lower court was reversed and the government was granted its writ. *Id.* at 2164. Marcus had relied on *Puckett v. United States*, 129 S.Ct. 1423, 1429 (2009), for the proposition that "certain errors, termed 'structural errors' might 'affect substantial rights' regardless of their actual impact on an appellant's trial." *Id.* at 1432; *Marcus*, 130 S.Ct. at 2164. This Court stated "that . . . while the rights at issue in this case are important, they do not differ significantly in importance from the constitutional rights at issue in other cases where we have insisted upon a showing of individual prejudice . . . " citing *Fulminante*, 499 U.S. at 306.

This case is especially important for concerns expressed in Justice Stevens' dissenting opinion. All sides agreed that the charging indictment was in error in failing to eliminate conduct which took place before the law made it illegal. However, Justice Stevens believed the majority was in error in believing that there must be a finding that an error of constitutional magnitude occurred in order for Marcus to be eligible for relief. He also questioned the need for remanding the case for further Rule 52(b) Plain Error analysis by the Second Circuit (on the third prong limitation). *Marcus*, 130 S.Ct. at 2167. He noted that the four separate inquiries required by *Olano* each required a distinct form of judgment and that several of which had generated significant appellate-court dissensus. *Marcus*, 130 S.Ct. at 2167.

Justice Stevens opined, "I am more concerned with this Court's approach to, and policing of Federal

Rule of Criminal Procedure 52(b)." *Id.* at 2167. He found the language of Rule 52(b) "straightforward," and noted that it "'is the mirror image of Rule 52(a), which instructs courts to disregard any error that does not affect substantial rights.'" He continues, "In our attempt to clarify Rule 52(b), we have, I fear, both muddied the waters and lost sight of the wisdom embodied in the Rule's spare text. Errors come in an endless variety of "'shapes and sizes.'" *Ante*, 130 S.Ct. at 2165-2166. Because error-free trials are so rare, appellate courts must repeatedly confront the question whether a trial judge's mistake was harmless or warrants reversal. They become familiar with particular judges and with the vast panoply of trial procedures, they acquire special expertise in dealing with recurring issues, and their doctrine evolves over time to help clarify and classify various types of mistakes. These are just a few of the reasons why federal appellate courts are "allowed a wide measure of discretion in the supervision of litigation in their respective circuits. Citing *Olano* at 725 (Stevens, J., dissenting)." *Marcus*, 130 S.Ct. at 2168. He continued, "This Court's ever more intensive efforts to rationalize plain-error review may have been born of a worthy instinct. But they have trapped the appellate courts in an analytic maze that, I have increasingly come to believe, is more liable to frustrate than to facilitate sound decision making." *Id.*

VIII. Development and Connection Between the Forfeiture Rule and the Rule of Retroactivity

Consider *Linkletter v. Walker*, 381 U.S. 618 (1965) which was decided after *Mapp v. Ohio*, 367 U.S. 643 (1961). *Mapp* had overruled *Wolf v. State of Colorado*, 338 U.S. 25 (1949), and created the exclusionary rule for evidence seized in violation of the Fourth Amendment's search and seizure prohibitions. The question which quickly arose was whether *Mapp* should be applied retroactively. The Court had already been applying *Mapp* (without comment) to other cases (including Mapp's wife). *Linkletter*'s holding was straightforward:

> All that we decide today is that though the error complained of might be fundamental it is not of the nature requiring us to overturn all *final convictions* based upon it. After full consideration of all the factors we are not about to say that the *Mapp* rule requires retrospective application.

Linkletter, 381 U.S. at 639-640. (*Emphasis added.*)

The court had considered a multitude of positions before reaching that holding. There was considerable disagreement based on philosophical differences between those Justices holding to a Blackstonian theory of law as opposed to those holding to the Austinian approach. The Court considered a number of earlier cases where each of the theories had at one time been the controlling theory. *See United States v. Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1801); *Gelpcke v.*

City of Dubuque, 1 Wall. 175, 17 L.Ed. 520 (1863); *Norton v. Shelby County,* 118 U.S. 425 (1886); *Kuhn v. Fairmont Coal Co.,* 215 U.S. 349, 371 (1910); *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358 (1932); *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371 (1940). *Linkletter,* 381 U.S. at 622-625.

Particularly worth noting for our purposes are the words of Chief Justice Marshall quoted at page 626 in *Linkletter*:

> It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied * * * the court must decide according to existing laws, and if it be necessary to set aside a judgment * * * which cannot be affirmed but in violation of law, the judgment must be set aside.

This same approach was subsequently applied in instances where a statutory change intervened, *Carpenter v. Wabash R. Co.,* 309 U.S. 23 (1940); where a constitutional amendment was adopted, *United States v. Chambers,* 291 U.S. 217 (1934); and where judicial decision altered or overruled earlier case law, *Vandenbark v. Owens-Illinois Glass Co.,* 311 U.S. 538 (1941). *See Linkletter,* 381 U.S. at 626.

Chief Justice Clark drew the following conclusions from the discussions in *Linkletter*:

> Under our cases it appears (1) that a change in law will be given effect while a case is on direct review, *Schooner Peggy, supra,* and (2) that the effect of the subsequent ruling of invalidity on prior final judgments when collaterally attacked is subject to no set "'principle of absolute retroactive invalidity'" but depends upon a consideration of "particular relations * * * and particular conduct * * * of rights claimed to have become vested, of status, or prior determinations deemed to have finality"; (3) and "of public policy in the light of the nature both of the statute and of its previous application."

Linkletter, 381 U.S. at 627. (Internal footnotes and citations omitted.)

IX. A Multitude of Cases Addressing the Issue of Retroactivity Follow *Linkletter*

The year after its decision in *Linkletter,* the Court decided *Johnson v. New Jersey,* 384 U.S. 719 (1966), which came before the court on collateral review. The Court held that its three-pronged analysis established in *Linkletter* was to be applied to convictions that were final as well as to those that were still pending on direct review.

The following year the Court decided *Stovall v. Denno,* 388 U.S. 293 (1967) announcing a general test for deciding whether and to what extent a new ruling

should operate retroactively: "(a) the purpose to be served by the new standard; (b) the extent of the reliance by law enforcement authorities on the old standards; and (c) the effect on the administration of justice of a retroactive application of the new standards." *Id.* at 297.

In 1969 the Court decided *Desist v. United States,* 394 U.S. 244 (1969) – a case perhaps most frequently cited for Justice Harlan's dissenting opinion.

X. 1971 Cases Begin a Steady Rise in Cases Addressing Retroactivity

Next the analysis needs to address two consolidated cases, *Williams v. United States* & *Elkanich v. United States*, Nos. 81 & 82, 401 U.S. 646 (1971), in which the Court was asked to decide whether *Chimel v. California,* was to be applied retroactively either to the direct review of *Williams* or the collateral proceeding initiated by *Elkanich*. This was another case where the clarifying law (the *Chimel* decision in this case) was announced after their trials. Reaffirming its recent decisions in like situations, the court held *Chimel* was not retroactive to either of the petitioners – neither of whom had suggested that his conviction was unconstitutionally obtained based on the law at the time of their arrests. The Court noted that it was

> [holding] to the course that there is no inflexible constitutional rule requiring in all circumstances either absolute retroactivity or complete prospectivity for decision construing the broad language of the Bill of Rights.

> Nor have we accepted as a dividing line the suggested distinction between cases on direct review and those arising on collateral attack.

Id. at 651-652. The Court continued:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application to those circumstances.

Id. at 653.

On the same day it decided the above two cases, the Court decided *Mackey v. United States,* 401 U.S. 667 (1971), in which the petitioner asked the court to reverse his conviction based on its recent decision in *Marchetti & Grosso,* invalidating the registration and gambling tax provisions because they compelled petitioners to incriminate themselves by the use of the documents at trial. Mackey lost on appeal as the Court found no reason to apply its recent decision to him retroactively. This caused Justice Harlan to write a concurring opinion in which he stated in part:

> Today's decisions mark another milestone in the development of the Court's "retroactivity"

> doctrine, which came into being somewhat less than six years ago in *Linkletter v. Walker* . . . That doctrine was the product of the Court's disquietude with the impacts of its fast-moving pace of constitutional innovation in the criminal field. Some members of the Court, and I have come to regret that I was among them, initially grasped this doctrine as a way of limiting the reach of decisions that seemed to them fundamentally unsound. Others rationalized this resort to prospectivity as a "technique" that provided an "impetus . . . for the implementation of long overdue reforms, which otherwise could not be practicably effected."

Citing *Jenkins v. Delaware*, 395 U.S. 213, 281 (1969), but at *Mackey*, p. 676, Justice Harlan continued, "What emerges from today's decisions is that in the realm of constitutional adjudication in the criminal field the Court is free to act, in effect, like a legislature, making its new constitutional rules wholly or partially retroactive or only prospective as it deems wise. I completely disagree with this point of view." *Id.* at 677.

In 1982 the Court decided *United States v. Johnson*, 457 U.S. 537 (1982) in which, to a large extent, it shifted course – reviewed at length the history of the Court's decisions in the area of retroactivity and embraced the views of Justice Harlan as expressed in *Desist* and *Mackey*: "Retroactivity must be rethought." The Court concluded that the retroactivity analysis for convictions that have become final must

be different from the analysis for convictions that are not final at the time the new decision is issued.

In *Batson v. Kentucky,* 476 U.S. 79 (1986), the petitioner came before this Court on collateral attack of his state court conviction. He established a prima facie case of racial discrimination violating the Fourteenth Amendment due to the prosecutor's peremptory challenges as to potential black jurors. He was granted the relief he requested.

XI. *Griffith v. Kentucky* Mandates Retroactivity to All Cases Still on Direct Review or Not Final

A few months later, companion cases *Griffith v. Kentucky* and *Brown v. United States,* 479 U.S. 314 (1987), came before the Court on *Batson* issues. Griffith had been tried in the same courthouse by the same judge and the same prosecutor as had defendant Batson three months earlier. Brown had been tried in federal court. The now well-known holding issued " . . . a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, *pending on direct review or not yet final,* with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Id.* at 328. (*Emphasis added.*)

This then brings the confluence of two directives meant to assure that justice will be done to criminal defendants who at earlier times would have seen no hope for remedial action. The first, Rule 52(b) which

permits a remedy for a forfeited error under circumscribed circumstances now gets the assistance of the holding of *Griffith* which directs all clarifying rules are to be retroactive.

XII. *Tapia v. United States* Provides the Clarifying Law Needed by Henderson

Tapia v. United States, 131 S.Ct. 2382 (2011), is the clarifying decision which satisfied petitioner Henderson's need for a "plain error" in his Rule 52(b) review. It was decided after the filing of his Rule 35(a) motion and his appeal brief with the Fifth Circuit. The *Tapia* Court was unanimous in its interpretation of the relevant statutes which conclusively prohibit a sentencing judge from considering a defendant's need for rehabilitation in deciding whether to impose a prison term at all or whether to lengthen a prison term to allow more time for rehabilitation. The only question left unanswered in *Tapia* comes in its final paragraph. What aspect of Rule 52(b) was the Court referring to in its directive for the appellate court to "consider the effect of Tapia's failure to object to the sentence when imposed?"

The final case petitioner specifically chooses to discuss is *Dorsey v. United States,* 567 U.S. ___, 132 S.Ct. 2321 (June 21, 2012), which held the Fair Sentencing Act's new, lower mandatory minimums apply to the post-Act sentencing of pre-Act offenders. The underlying question before the Court was congressional

intent as revealed in the Fair Sentencing Act's language, structure, and basic objectives. The majority rest[ed] their "conclusion primarily upon the fact that a contrary determination would seriously undermine basic Federal Sentencing Guidelines' objectives such as uniformity and proportionality in sentencing." *Id.*, slip. op. at 2. Both petitioner and respondent agreed that the FSA should apply to those individuals sentenced in the narrow window of time between August 3, 2010 (the day the order creating the FSA was signed) and November 1, 2010 when the amended guidelines went in to effect.

This Court was particularly concerned about the impact of applying the FSA only prospectively. The notion of "transitional moments" in criminal law was nothing new. However, in this case the very narrow prechange/postchange period was extremely short – almost contemporaneous. *See Dorsey*, slip. op. at 15. The Court felt it would "highlight a kind of unfairness that modern sentencing statutes typically seek to combat." *Id.* It would also result in unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." *Id.* "Further, it would involve imposing upon the pre-Act offender a pre-Act sentence at a time after Congress had specifically found in the Fair Sentencing Act that such a sentence was unfairly long." *Id.* Furthermore, the Court could find no "countervailing consideration." *Id.*, slip. op. at 18.

XIII. What Statistics Suggest About Forfeiture and Retroactivity

It is difficult to discern precisely what impact the forfeiture rules might have on petitioners forced to appeal under Rule 52(b). Professor Hytens presents some interesting statistics at page 944 n. 111 of his article. "During the most recent four years for which data is available, the reversal rate in federal criminal appeals has never exceeded 6.4%." This figure includes defendants whose appeals were "dismissed due to procedural defects, rejected on the merits, or failed because any error was harmless, as well as those who lost because of forfeiture rules." Looking next to two data points which were less systematic in nature, Professor Hytens provided numbers which focused solely on the operation of forfeiture rules in federal criminal appeals.

> A Westlaw search performed on October 9, 2005 revealed 1717 decisions issued by federal courts of appeals during the previous three years that cited at least one of the following: (1) Federal Rule of Criminal Procedure 52(b), the provision that governs review of forfeited claims; (2) *United States v. Olano*, 507 U.S. 725, the decision that first announced the four-factor test used to review such claims, *see infra* notes 129-136; (3) *Johnson v. United States*, 520 U.S. 461 (1997), the first Supreme Court decision to discuss the proper manner of applying plain error review in the changed-law context, *see infra* notes pp. 138-148; or (4) *United States v. Cotton*, 536 U.S. 625 (2002) which applied the *Johnson*

> [520 U.S. 461] analysis to review of forfeited claims based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *see infra* notes at pp. 149-157. Second, notwithstanding the fact that *Apprendi* was one of the most significant law-altering decisions issued by the Supreme Court during the last several decades . . . the United States Court of Appeals for the Eleventh Circuit – which hears the third largest number of criminal appeals of any circuit in the nation – appears to have never granted relief based on a "forfeited" *Apprendi* claim.

Toby J. Hytens, "Managing Transitional Moments in Criminal Cases," THE YALE LAW JOURNAL 115:932 (2006) at 944, n. 111. (Citations omitted.)

> A Westlaw Keycite search performed on December 8, 2005 indicated *Apprendi* had been cited by courts 13,225 times. As of the same date, *Dickerson v. United States*, 530 U.S. 428 (2000), which reaffirmed the constitutional status of the *Miranda* warnings and was decided on the same day as *Apprendi*, had been cited by courts 575 times; *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), which upheld the Scouts' claim of constitutional entitlement to expel an openly gay Scoutmaster and was decided two days after *Apprendi* and *Dickerson*, had been cited by courts a mere 99 times.

See Hytens at 935, n. 58.

In her dissenting opinion in *Apprendi*, Justice O'Connor predicted a massive transitional moment as

a result of the Court's new decision in *Apprendi*. There were predictions "the [*Apprendi*] decision may have rendered unconstitutional then-prevailing sentencing practices under at least fifty-seven federal and sixteen state statutes." Hytens at 935, n. 57.

A 2004 compendium of federal justice statistics suggests "over 95% of all federal criminal prosecutions are terminated by a plea bargain." Hytens at 939-940, n. 90. Further statistics indicate that "in 1971 the federal courts disposed of 32,103 criminal cases by trial or guilty plea; in 2004, the number was 73,616." Hytens at 940, n. 94. "During 2002, 42% of all federal felony convictions were for drug offenses." Hytens at 941, n. 98.

It is difficult to make any sound conclusions from these statistics. But it does seem unlikely that using a "time of appeal" test for Rule 52(b) plain error determination is likely to make a profound difference in the number of reversals on direct appeal.

CONCLUSION

The court of appeals erred in holding that Federal Rule of Criminal Procedure 52(b) requires the error to be plain at the time of forfeiture in addition to the time of appeal. Its judgment should therefore be reversed and the case remanded for application of the correct standard.

The forfeiture approach as governed by Rule 52(b) has become one of the dominant means by

which federal courts limit the disruptive effects of legal change in the context of direct review of federal criminal cases. In petitioner's case, the Fifth Circuit's decision to follow *Griffith*'s directive and apply clarifying law to the first prong of *Olano* but to withhold it when considering the second prong, does not comply with the purpose of Rule 52(b) which was to see that petitioners are treated justly. This Court should conclude that the clarifying law must also be applied to the second prong of *Olano* making the error which is now extant also "plain" for purposes of Rule 52(b) review. Those purposes generally cited in support of forfeiture rules – avoiding error by trial judges, deterring sandbagging by defense counsel, and encouraging the creation of complete appellate records – have little application when the rules have changed dramatically between the time of trial and the time of appeal. In addition to the obvious primary cases addressing this issue, petitioner has relied on two especially relevant and helpful law review articles: Toby J. Hytens, "Managing Transitional Moments in Criminal Cases," THE YALE LAW JOURNAL, Vol. 115: 922-999 (2006) and Professor Alison LaCroix, "Temporal Imperialism," The Law School, The University of Chicago, as published in UNIVERSITY OF PENNSYLVANIA LAW REVIEW, Vol. 158, 1329 (2010).

The First, Second, Tenth and Eleventh Circuits have explicitly held that the plainness of error should be determined at the time of appellate review when the law is unsettled at the time of trial but becomes clear by the time of appeal. The Third, Sixth, Seventh, and Eighth Circuits state that they would

evaluate the plainness of error at the time of appeal, although these circuits have not expressly decided the issue of whether this principle applies when the error is unclear at the time of trial. As of July 25, 2012, the Fifth Circuit in an en banc ruling, joined the ranks of the majority circuits in *United States v. Escalante-Reyes*, No. 11-40632.

The Ninth and the District of Columbia Circuits are the only circuits squarely holding that if the law is unclear at the time of trial and later becomes clear, the error is evaluated based on the law as it existed at the time of trial.

Though not convinced the forfeiture approach is the best means for coping with transitional moments in the direct review context, Professor Hytens believes "the reviewing court's assessment of whether any error was plain (that is clear or obvious) should still be as of the time of appeal." Hytens at 959. He believes using the time of appeal evaluation is the only way the *Olano* standard will work. *Id.* at 971. He is nevertheless concerned that the formula has lead to a situation where the right hand giveth and the left hand taketh away. *Griffith* provides the plain error and prongs three and four of *Olano*'s structural forfeiture rule eliminates their usefulness. Hytens at 979. But that discussion is for another day.

The rulemaking history of this Court relative to Rule 52(b) reflects its focus on preventing miscarriage of justice rather than evaluating the correctness of district courts' decisions. Applying a time of appeal

standard comports with such a goal at least until a case has become final.

Respectfully submitted,

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RESPONDENT'S BRIEF

No. 11-9307

IN THE SUPREME COURT OF THE UNITED STATES

ARMARCION D. HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an error is "plain" for purposes of review under Federal Rule of Criminal Procedure 52(b) when the law is unsettled at the time the error is committed but becomes clear by the time of a subsequent appeal.

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JURISDICTION

The judgment of the court of appeals was entered on July 8, 2011. A petition for rehearing was denied on December 15, 2011 (Pet. App. 8a). The petition for a writ of certiorari was filed on

March 14, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Louisiana, petitioner was convicted of one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 60 months of imprisonment, to be followed by a three-year term of supervised release. The court of appeals affirmed. Pet. App. 1a-4a.

1. On January 13, 2009, a police officer in Haynesville, Louisiana, initiated a traffic stop of a truck that had been weaving and crossing the center line. As he approached the car to obtain the driver's information, the officer observed a rifle magazine protruding from under the passenger seat, where petitioner was sitting. The officer instructed petitioner and the driver to step out of the vehicle for safety reasons. The driver then fled on foot, and the officer detained petitioner. When the officer returned to the truck, he found a loaded semiautomatic rifle under the passenger seat. Petitioner later admitted to the officer that he was a convicted felon and said that he would "take the gun charge." Presentence Investigation Report (PSR) para. 6; see PSR paras. 4-7; 5:09-cr-00111, Doc. No. 53, at 7-11 (W.D. La. July 14, 2010) (change of plea hearing) (Doc. No.).

2. Petitioner was charged in a single-count indictment with being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). After the district court denied his motion to suppress the firearm found during the traffic stop, petitioner entered a conditional plea of guilty, reserving his right to appeal the denial of his motion to suppress. See Doc. No. 41, at 1-2 (Feb. 1, 2010).

a. The PSR prepared by the Probation Office calculated petitioner's range under the advisory Sentencing Guidelines as 33 to 41 months, based on a total offense level of 19 and a criminal history category of II. See PSR para. 45. The PSR noted that petitioner, who was then 26 years old, had admitted to using marijuana since age 14 and to doing so "daily prior to his arrest for the instant offense." PSR para. 39.

Petitioner did not object to the advisory Guidelines range, but did seek to clarify in a letter to the Probation Office that drug tests administered near the time of his offense showed that he had not been using marijuana at that time. See 10-30571, Doc. No. 511313422, at 1 (5th Cir. Dec. 6, 2010). Petitioner stated, however, that he "ha[d] had a drug problem for many years," "was never in a drug treatment program," and "may very well benefit from such a program at this point in his life." Ibid. In a subsequent sentencing memorandum, petitioner further stated that he "needs professional treatment for drug abuse" and urged the court, on

behalf of "his family and friends," to "do whatever is in its power to have treatment ordered for [petitioner]." Id. at 8.[1]

b. The district court sentenced petitioner to an above-Guidelines sentence of 60 months of imprisonment, to be followed by three years of supervised release. See Pet. App. 39a-40a; see also Doc. No. 54, at 28-29 (July 14, 2010) (sentencing transcript). The court was "convinced" that if petitioner did not address his drug-abuse problem immediately, he would "be one of the people in the future whose life will be thrown away and he'll face perpetual incarceration." Id. at 15. The "dilemma," the court explained, was that a term of imprisonment within the advisory Guidelines range would not leave petitioner in federal custody long enough to qualify for placement in the Bureau of Prisons' 500-hour Residential Drug Abuse Program (RDAP). Id. at 12-13, 16, 21. The court therefore questioned whether it should order a longer period of imprisonment "because he needs that treatment," or instead "shorten [petitioner's] sentence just to get him out of the system more quickly?" Id. at 16-17.

The district court ultimately decided to impose the longer period of imprisonment. The court stated that it was "not trying

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[1] Petitioner's letter to the Probation Office and his subsequent sentencing memorandum were not docketed in the district court. That court, however, considered them. See Doc. No. 54, at 2-6 (July 14, 2010) (sentencing transcript). In addition, the court of appeals granted the government's unopposed motion to supplement the record on appeal with both filings. See 10-30571, Doc. No. 511315922 at 1 (5th Cir. Dec. 7, 2010).

to be purely punitive," but was acting to provide petitioner "with needed * * * medical care, or other correctional treatment in the most effective manner." Doc. No. 54, at 24 (quoting 18 U.S.C. 3553(a)(2)(D)). The court explained that it was imposing a non-Guidelines sentence pursuant to 18 U.S.C. 3553(a) "because this defendant needs training, he needs counselling, and he needs substance abuse treatment within the confines of that system." Doc. No. 54, at 28; see id. at 29 (explaining that the court had "to give him that length of time to do the programming and the treatment and the counselling that this defendant needs right now"). The court further explained that the 500-hour treatment program "will be the best available" for petitioner, and it expressed its hope that he would receive treatment within that program. Id. at 28. When the court asked defense counsel whether any reasons indicated "why that sentence as stated should not be imposed," counsel replied, "[p]rocedurally, no." Id. at 30.

c. Eight days after the sentencing hearing, petitioner filed a motion to correct his sentence pursuant to Federal Rule of Criminal Procedure 35. Rule 35 provides that, "[w]ithin 14 days" of a sentencing court's oral announcement of its sentence, "the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(a); see Fed. R. Crim. P. 35(c). Petitioner argued, as relevant here, that the district court had committed a "clear error" within the meaning of

Rule 35 when it had increased his sentence to make him eligible for drug treatment. According to petitioner, that increase was not permitted by 18 U.S.C. 3582(a), which states that "imprisonment is not an appropriate means of promoting correction and rehabilitation." Following briefing from the parties, the court denied petitioner's motion. The court concluded that it "no longer ha[d] jurisdiction to correct any alleged error in [petitioner's] sentence pursuant to Rule 35(a), as almost sixty days have passed since the oral announcement of sentence." Pet. App. 6a.

3. a. The court of appeals affirmed. Pet. App. 1a-4a. The court first held that its review was for plain error, because petitioner's Rule 35 motion had not preserved his claim. Id. at 3a-4a.[2] Conducting plain-error review, the court recognized that, under this Court's intervening decision in Tapia v. United States, 131 S. Ct. 2382 (2011), "it is error for a court to 'impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation.'" Pet. App. 4a (quoting Tapia, 131 S. Ct. at 2393). The court of appeals therefore agreed with petitioner that the district court had erred in increasing his sentence so that he would be eligible for the Bureau of Prisons' drug treatment program. The court of appeals reasoned, however, that the error was not plain, "because an error

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[2] Petitioner does not dispute (Pet. 6 n.2) the court of appeals' conclusion that his Rule 35 motion failed to preserve his claim of error and that the claim was therefore forfeited.

is plain only if it 'was clear under current law at the time of trial.'" Ibid. (quoting United States v. Jackson, 549 F.3d 963, 977 (5th Cir. 2008), cert. denied, 130 S. Ct. 51 (2009)). Because at the time of petitioner's sentencing this Court "had not yet decided Tapia" and the court of appeals "had not yet addressed the question," the court of appeals concluded that "any error cannot be plain" and affirmed petitioner's sentence. Ibid.

b. The court of appeals denied rehearing en banc by a divided vote. Pet. App. 8a. Judge Haynes, joined by Judge Dennis, dissented from the denial of rehearing en banc. Id. at 9a-18a. Judge Haynes argued in relevant part that the case was "worthy of the full court's consideration," because in her view the question of "whether the 'obviousness' of [an] error made is judged at the time of the error or at the time of appeal" is the subject of both an intra-circuit and inter-circuit conflict. Id. at 12a-13a, 18a.

DISCUSSION

Petitioner contends (Pet. 7-29) that, for purposes of plain-error review, an error is plain when the law is unsettled at the time the error is committed but becomes clear by the time of a subsequent appeal. The court of appeals correctly held to the contrary that when the relevant law is unsettled at the time of trial but is clarified by a judicial decision issued during the pendency of a defendant's appeal, the plainness of the asserted error is to be measured at the time that the defendant forfeited

his claim of error. Nevertheless, the circuits disagree on that question, the conflict merits this Court's resolution, and this case would be an appropriate vehicle for review. Alternatively, because the court of appeals recently granted initial hearing en banc to reconsider the sole question presented in this petition, the Court may wish to hold this case pending the Fifth Circuit's en banc decision and then dispose of this case as appropriate in light of that decision.[3]

1. a. Rule 52(b) of the Federal Rules of Criminal Procedure provides that "[a] plain error that affects substantial rights may be considered, even though it was not brought to the court's attention." This Court has held that, to obtain relief under plain-error review, a criminal defendant must establish that (1) the district court committed an error; (2) the error was "clear or obvious, rather than subject to reasonable dispute"; (3) the error "affected [his] substantial rights"; and (4) a reviewing court should exercise its discretion to remedy the error only if the error "seriously affect[ed] the fairness, integrity or public reputation of [the] proceedings." Puckett v. United States, 556 U.S. 129, 135 (2009) (quoting in part United States v. Olano, 507 U.S. 725, 736 (1993)).

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[3] The same issue is presented in the petition for a writ of certiorari in Davis v. United States, No. 11-9422 (filed Mar. 20, 2012).

Although the Court has held that an error must be "clear or obvious" to be "plain," it has not addressed the correct point in time for measuring the obviousness of an error in the circumstances presented here, i.e., when the law is unsettled at the time the error is committed but becomes clear by the time of a subsequent appeal. The Court explained in Olano that, "[a]t a minimum, a court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law." 507 U.S. at 734. The Court recognized, however, that requiring an error to be clear at the time of its correction on appeal did not dispose of "the special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." Ibid. The Court in Olano expressly reserved and did not decide that "special case." Ibid.

In Johnson v. United States, 520 U.S. 461 (1997), the Court held that an error is "plain" under the law at the time of appeal in the circumstance "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal." Id. at 468. The Court reasoned that requiring an objection in such a case would be pointless and "would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent." Ibid. As in Olano, however, the Court in Johnson did not address the situation in which the law at the time of trial is unsettled but becomes

clear by the time of a subsequent appeal. Petitioner thus correctly observes that "[t]his Court's decisions on plain-error review * * * leave open the important question presented here." Pet. 7; see ibid. ("In Johnson * * * , the Court again left open Olano's 'special case.'").

b. The court of appeals correctly held that an error is not "plain" when the law is unsettled at the time of forfeiture but becomes clear by the time of appeal. Pet. App. 4a. Rule 52(b) provides that "[a] plain error that affects substantial rights may be considered, even though it was not brought to the court's attention." The rule's second clause, which is in the past tense, employs "backward-looking language" that suggests that the error subject to correction must be of the same character -- i.e., it must be "plain" -- both at the time of forfeiture and at the time that it is "considered" on appeal. Cf. Greene v. Fisher, 132 S. Ct. 38, 44 (2011) (use of "backward-looking language" in federal habeas statute required assessing law as of time that state courts rendered their decision).

That reading of Rule 52(b)'s text is consistent with the understanding of the plain-error rule expressed in United States v. Frady, 456 U.S. 152 (1982), where this Court stated that "recourse may be had to [Rule 52(b)] only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance

in detecting it." Id. at 163. The courts of appeals have often repeated that characterization of the narrow scope of plain-error review, see, e.g., United States v. Delgado, 672 F.3d 320, 330 (5th Cir. 2012) (en banc); United States v. Turner, 651 F.3d 743, 748 (7th Cir.), cert. denied, 132 S. Ct. 863 (2011); United States v. Boyd, 640 F.3d 657, 669 (6th Cir.), cert. denied, 132 S. Ct. 271 (2011); United States v. King, 559 F.3d 810, 814 (8th Cir.), cert. denied, 130 S. Ct. 167 (2009); United States v. Villafuerte, 502 F.3d 204, 209 (2d Cir. 2007), and that focus on participants in the trial court proceedings necessarily forecloses relief under the plain-error standard where an error becomes "plain" only at the time of appeal. See United States v. Turman, 122 F.3d 1167, 1170 (9th Cir. 1997) (plain error means "error that is so clear-cut, so obvious, a competent district judge should be able to avoid it without benefit of objection") (Kozinski, J.).

As the District of Columbia Circuit has explained, a time-of-forfeiture rule thus furthers the interests underlying plain-error review by encouraging the parties to alert the district court to potential error at a time when that court can take remedial action. See United States v. Mouling, 557 F.3d 658, 664 ("[T]he interest in requiring parties to present their objections to the trial court, which underlies plain error review, applies with full force."), cert. denied, 130 S. Ct. 795 (2009). The decision below is therefore fully consistent with Johnson, supra, because unlike in

the circumstance where the law at the time of trial is settled against the would-be objector and any objection would be pointless, requiring an objection in the face of unsettled law is "far from pointless" and instead "serve[s] a valuable function." Mouling, 557 F.3d at 664.[4]

As an initial matter, the objection "affords the judge an opportunity to focus on the issue and hopefully avoid the error." Turman, 122 F.3d at 1170; see United States v. David, 83 F.3d 638, 643 (4th Cir. 1996) (Luttig, J.); Toby J. Heytens, Managing Transitional Moments in Criminal Cases, 115 Yale L.J. 922, 958 (2006) (Heytens) ("[A]n objection may prevent an error from happening in the first place, either because the judge sustains the defendant's objection or the prosecutor backs off."). In addition, requiring a contemporaneous objection serves to deter a defendant from "'sandbagging' the court -- remaining silent about his

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[4] This case involves a claim of sentencing error under Tapia v. United States, 131 S. Ct. 2382 (2011). It therefore does not present the question of whether an error should be corrected on plain-error review, even when the law was unclear when the alleged error occurred, because an intervening decision establishes that the defendant was convicted "for an act that the law does not make criminal," which "inherently results in a complete miscarriage of justice." Davis v. United States, 417 U.S. 333, 346 (1974) (granting relief on that basis under 28 U.S.C. 2255); cf. Frady, 456 U.S. at 166 (making clear that "to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal" under the plain-error rule); Bousley v. United States, 523 U.S. 614, 623 (1998) (noting that actual innocence is an exception to procedural default on direct appeal). Petitioner's claim is not one of actual innocence based on an intervening decision.

objection and belatedly raising the error only if the case does not conclude in his favor." Puckett, 556 U.S. at 134. Moreover, "even when the judge and prosecutor disagree with the defendant's view of the law, a timely objection will sometimes yield benefits by spurring the prosecutor to supplement the record, or prompting the trial court to seek additional information, make predicate factual findings, [] state on the record the basis for [the court's decision]," or even provide alternative grounds for that decision. Heytens at 958; see Puckett, 556 U.S. at 134.

2. Petitioner is correct (Pet. 7-17) that the courts of appeals are divided on the question of whether, when the law is unsettled at the time of an error but settled by the time of appeal, the obviousness of the error is measured at the time the claimed error was forfeited or at the time of appeal. That conflict -- which is on an issue that this Court has twice noted and reserved in Olano and Johnson, see pp. 9-10, supra -- merits resolution.

As petitioner points out (Pet. 8-15), the court of appeals' conclusion that the obviousness of an error is measured at the time of forfeiture when an intervening decision settles previously unsettled law accords with decisions of the Ninth and District of Columbia Circuits. See Mouling, 557 F.3d at 664; Turman, 122 F.3d at 1170; see also United States v. Greer, 640 F.3d 1011, 1023 (9th Cir.) (reaffirming rule stated in Turman), cert. denied, 132 S. Ct.

834 (2011). By contrast, the First, Second, and Tenth Circuits have extended the rule in Johnson to cases in which circuit law was unsettled at the time of the mistake. These courts apply "a blanket rule that plain error is measured at the time of appeal." United States v. Cordery, 656 F.3d 1103, 1107 (10th Cir. 2011); see United States v. Farrell, 672 F.3d 27, 36-37 (1st Cir. 2012); United States v. Garcia, 587 F.3d 509, 520 (2d Cir. 2009).[5]

Petitioner suggests (Pet. 11-12 & n.4) that the court of appeals' decision is also in conflict with the rule applied by the Sixth Circuit. That is incorrect. The principal decision that petitioner cites (Pet. 11-12), United States v. Brown, No. 97-1618, 2000 WL 876382 (6th Cir. June 20), cert. denied, 531 U.S. 1057 (2000), is unpublished and therefore not precedential. See 6th Cir. R. 206(c); United States v. Utesch, 596 F.3d 302, 312 (6th Cir. 2010). Petitioner asserts (Pet. 12 n.4) that "[t]he Sixth Circuit has since reaffirmed its support for the time-of-appeal standard in dicta," but he cites only an opinion by a single judge concurring in the judgment in that case. See United States v. Gabrion, 517 F.3d 839, 875 (6th Cir. 2008) (Moore, J., concurring

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[5] The Eleventh Circuit has indicated agreement with the First, Second, and Tenth Circuits, but its only on-point decision addressed the issue in dicta, see United States v. Smith, 459 F.3d 1276, 1283-1284 (2006), cert. denied, 549 U.S. 1137 (2007), and relied exclusively on an earlier opinion in the same case that had been vacated by this Court. See id. at 1284 (discussing United States v. Smith, 402 F.3d 1303, 1315 n.7 (11th Cir.), vacated on other grounds, 545 U.S. 1125 (2005)).

in the judgment), cert. denied, 129 S. Ct. 1905 (2009). The lead opinion in that case, which did not command a majority of the panel, declined to address the issue. See id. at 842 n.3 (Batchelder, J.).[6]

3. The division among the circuits is sufficiently important to warrant this Court's review. As in this case, the issue can be dispositive of whether defendants are eligible to receive relief. It also implicates matters of judicial efficiency, i.e., whether an appellate court is able to reject a forfeited claim without engaging in the fact-intensive inquiry usually required to determine whether the third and fourth prongs of the plain-error test are satisfied. Here, for instance, it was not difficult for the court of appeals to determine that a Tapia error was not plain at the time of sentencing because the law was unsettled at that time, see Pet. App. 4a, but under a time-of-appeal rule the court would not have been able to resolve the Tapia claim without a thorough review of the record to determine whether the error was prejudicial in the context of the entire sentencing and whether the

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[6] Petitioner is correct (Pet. 17) that other courts have addressed the timing question in dicta, but those courts did so either before this Court's decision in Johnson, see United States v. Ross, 77 F.3d 1525, 1539 (7th Cir. 1996), or in circumstances that fall within the exception recognized in Johnson -- that is, where the law at the time of the error was settled and clearly contrary to the law at the time of appeal, see, e.g., United States v. Moody, 664 F.3d 164, 166-167 (7th Cir. 2011); United States v. Crosgrove, 637 F.3d 646, 654-657 (6th Cir. 2011); United States v. Davidson, 551 F.3d 807, 808 (8th Cir. 2008).

court should have exercised its discretion to correct the error. See, e.g., United States v. Broussard, 669 F.3d 537, 551-552, 555 (5th Cir. 2012). In addition, the number of recent circuit court decisions indicates that the issue arises frequently.

4. Shortly after the filing of the petition in this case, the court of appeals sua sponte granted initial hearing en banc to consider in another case the sole question presented in this petition. See United States v. Escalante-Reyes, No. 11-40632, Doc. No. 511798245 (5th Cir. Mar. 22, 2012). The court of appeals' en banc order noted an intra-circuit conflict and sought supplemental briefing on the question

> whether, when the law at the time of trial or plea is unsettled in this circuit, but becomes clear while the case is pending on appeal, review for the second prong of the "plain error" test properly considers the law as it stood during the district court proceedings or at the time of the appellate court's decision.

Ibid. The order further stated that the case would be submitted without oral argument at the May 3, 2012 court session. Ibid.

Although this Court could elect to defer resolution of this issue until the court of appeals has decided Escalante-Reyes, plenary review of this case is warranted at this time. As petitioner observes (Pet. 29), the forthcoming en banc decision in Escalante-Reyes will not eliminate the inter-circuit conflict. Regardless of how the Fifth Circuit rules, other circuits will continue to disagree, and it is unlikely that the conflict will be resolved without this Court's intervention. Further, petitioner's

sentence is currently set to expire on May 22, 2013, which suggests that deferring review may not be warranted.[7]

Alternatively, this Court may wish to hold this petition pending the en banc decision in Escalante-Reyes. If the court of appeals adopts a position contrary to the panel in this case, the Court could grant the petition, vacate the judgment, and remand for reconsideration in light of Escalante-Reyes. If the court of appeals reaffirms the position taken in this case, the Court could decide at that time whether plenary review is warranted.

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[7] If this Court were not able to resolve the case by the time of petitioner's release from prison, a serious question of mootness would arise. See Rhodes v. Judiscak, No. 10-2268, 2012 WL 171917 (10th Cir. Jan. 23, 2012), petition for cert. pending, No. 11-1177 (filed Mar. 26, 2012).

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending the court of appeals' en banc decision in United States v. Escalante-Reyes, No. 11-40632 (5th Cir.), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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MAY 2012

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Whether an error is "plain" for purposes of review under Federal Rule of Criminal Procedure 52(b) when the law is unsettled at the time the error is committed but becomes clear by the time of a subsequent appeal.

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JURISDICTION

The judgment of the court of appeals was entered on July 8, 2011. A petition for rehearing en banc was denied on December 15, 2011 (Pet. App. 8a), and a petition for panel rehearing was denied on January 30, 2012 (Pet. App. 19a). The petition for a writ of certiorari was filed

on March 14, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES INVOLVED

Federal Rules of Criminal Procedure 35, 51, and 52 are reproduced in the appendix to this brief. App., *infra*, 1a-3a. The provision directly at issue here is Rule 52(b), which provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Louisiana, petitioner was convicted of one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 60 months of imprisonment, to be followed by a three-year term of supervised release. The court of appeals affirmed. Pet. App. 1a-4a.

1. In January 2009, a police officer in Haynesville, Louisiana, initiated a traffic stop after observing a truck weaving across the center line of the road. As the officer approached the truck to obtain the driver's information, the officer saw a rifle magazine protruding from underneath the passenger seat, where petitioner was sitting. The officer instructed petitioner and the driver to step out of the vehicle for safety reasons. The driver then fled on foot, and the officer detained petitioner. When the officer returned to the truck, he found a loaded semiautomatic rifle under the passenger seat. Petitioner later admitted to the officer that he had received the rifle from the father of an acquaintance. He also admitted that he was a convicted felon and said that he would "take the gun charge." Presentence Investigation Report (PSR) para. 6; see PSR paras. 4-7;

5:09-cr-00111, Docket entry No. 53, at 7-11 (W.D. La. July 14, 2010) (Doc. No.) (change of plea hearing).

2. Petitioner was charged in a single-count indictment with being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). After the district court denied his motion to suppress the firearm found during the traffic stop, petitioner entered a conditional plea of guilty, reserving his right to appeal the denial of his motion to suppress. See Doc. No. 41, at 1-2 (Feb. 1, 2010).

a. The PSR prepared by the Probation Office calculated petitioner's range under the advisory Sentencing Guidelines as 33 to 41 months, based on a total offense level of 19 and a criminal history category of II. See PSR para. 45. The PSR noted that petitioner, who was then 26 years old, had admitted to using marijuana since he was 14 and to doing so "daily prior to his arrest for the instant offense." PSR para. 39. The PSR also noted that petitioner had not received any substance abuse treatment. See *ibid.*

Petitioner did not object to the advisory Guidelines range, but did seek to clarify in a letter to the Probation Office that drug tests administered near the time of his offense showed that he had not been using marijuana at that time. See 10-30571, Document No. 511313422, at 1 (5th Cir. Dec. 6, 2010). Petitioner stated, however, that he "ha[d] had a drug problem for many years," "was never in a drug treatment program," and "may very well benefit from such a program at this point in his life." *Ibid.* In a subsequent sentencing memorandum, petitioner further stated that he "need[ed] professional treatment for drug abuse" and urged the court, on behalf of "his family and friends," to "do whatever [was] in its power to have treatment ordered for [him]." *Id.* at 8. At the sentencing hearing, petitioner again emphasized

to the court his "need for that drug treatment." Doc. No. 54, at 5 (July 14, 2010) (sentencing transcript).[1]

b. The district court sentenced petitioner to an above-Guidelines sentence of 60 months of imprisonment, to be followed by three years of supervised release. See Pet. App. 39a-40a; see also Doc. No. 54, at 28-29. The court found a "logical and easy connection" between petitioner's "criminal activities and drug use." *Id.* at 13. The court was "convinced" that if petitioner did not address his drug-abuse problem immediately, he would "be one of the people in the future whose life will be thrown away" and who would "face perpetual incarceration." *Id.* at 15. The "dilemma," the court observed, was that a term of imprisonment within the advisory Guidelines range would not leave petitioner in federal custody long enough to qualify for placement in the Bureau of Prisons' 500-hour Residential Drug Abuse Program. *Id.* at 12-13, 16, 21. The court therefore questioned whether it should order a longer period of imprisonment "because he needs that treatment," or instead "shorten [petitioner's] sentence just to get him out of the system more quickly?" *Id.* at 16-17.

The district court ultimately decided to impose the longer period of imprisonment in order to allow petitioner to obtain drug abuse treatment while in prison. The court explained that it was "not trying to be purely punitive," but that instead its goal was "to try to help" petitioner by providing him "with needed * * * medi-

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[1] Petitioner's letter to the Probation Office and his subsequent sentencing memorandum were not docketed in the district court, but that court considered them at the sentencing hearing. See Doc. No. 54, at 2-6. The court of appeals granted the government's unopposed motion to supplement the record on appeal with both documents. See 10-30571, Document No. 511315922, at 1 (5th Cir. Dec. 7, 2010).

cal care, or other correctional treatment in the most effective manner." Doc. No. 54, at 24 (quoting 18 U.S.C. 3553(a)(2)(D)). The court reiterated that it was imposing a non-Guidelines sentence "because this defendant needs training, he needs counselling, and he needs substance abuse treatment within the confines of that system." *Id.* at 28; see *id.* at 29 (explaining that the court had "to give him that length of time to do the programming and the treatment and the counselling that this defendant needs right now"). The court stated that the 500-hour treatment program "will be the best available" for petitioner and expressed its hope that he would receive treatment within that program. *Id.* at 28. When the court asked defense counsel for "any reason why that sentence as stated should not be imposed," counsel replied, "[p]rocedurally, no." *Id.* at 30.

c. Eight days after the sentencing hearing, petitioner filed a motion to correct his sentence pursuant to Federal Rule of Criminal Procedure 35. Rule 35 provides that, "[w]ithin 14 days" of a sentencing court's oral announcement of its sentence, "the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(a); see Fed. R. Crim. P. 35(c). Petitioner argued in relevant part that the district court had committed a "clear error" within the meaning of Rule 35 when it had increased his sentence to make him eligible for drug treatment. According to petitioner, that increase was not permitted by 18 U.S.C. 3582(a), which states that "imprisonment is not an appropriate means of promoting correction and rehabilitation." Following briefing from the parties, the court denied petitioner's motion. The court concluded that it "no longer ha[d] jurisdiction to correct any alleged error in [petitioner's] sentence pursuant to Rule

35(a), as almost sixty days ha[d] passed since the oral announcement of sentence." Pet. App. 6a.

3. a. The court of appeals affirmed. Pet. App. 1a-4a. The court first held that its review was for plain error, because petitioner's Rule 35 motion had not preserved his claim. *Id.* at 3a-4a.[2] Conducting plain-error review, the court recognized that this Court's intervening decision in *Tapia* v. *United States*, 131 S. Ct. 2382 (2011), had held that "it is error for a court to 'impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation.'" Pet. App. 4a (quoting *Tapia*, 131 S. Ct. at 2393). The court of appeals therefore agreed with petitioner that the district court had erred in increasing his sentence so that he would be eligible for the Bureau of Prisons' drug treatment program. The court of appeals explained, however, that the error was plain "only if it 'was clear under current law *at the time of trial*.'" *Ibid.* (quoting *United States* v. *Jackson*, 549 F.3d 963, 977 (5th Cir. 2008), cert. denied, 130 S. Ct. 51 (2009)). Because at the time of petitioner's sentencing this Court "had not yet decided *Tapia*" and the court of appeals "had not yet addressed the question," the court of appeals concluded that "any error cannot be plain" and affirmed petitioner's sentence. *Ibid.*

b. The court of appeals denied rehearing en banc by a divided vote. Pet. App. 8a. Judge Haynes, joined by Judge Dennis, dissented from the denial of rehearing en banc. *Id.* at 9a-18a. Judge Haynes argued in relevant part that the case was "worthy of the full court's consideration," because in her view the question of "whether

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[2] Petitioner does not dispute (Pet. 6 n.2) the court of appeals' conclusion that his Rule 35 motion failed to preserve his claim of error and that the claim was therefore forfeited.

the 'obviousness' of [an] error made is judged at the time of the error or at the time of appeal" was the subject of both an intra-circuit and inter-circuit conflict. *Id.* at 12a-13a, 18a.

4. Shortly after the filing of the petition in this case, the court of appeals sua sponte granted initial hearing en banc to consider in another case the question presented here. See *United States* v. *Escalante-Reyes*, 11-40632, Document No. 511798245 (5th Cir. Mar. 22, 2012). The government notified the Court of that development in its brief at the certiorari stage, although in its view plenary review of this case was warranted in light of the deep circuit conflict (which *Escalante-Reyes* could not eliminate) and petitioner's impending release date in May 2013 (which counseled against deferring review). See Gov't Br. 16-17.

On July 25, 2012, after this Court had granted a writ of certiorari but before petitioner filed his merits brief, the en banc court of appeals ruled in a divided opinion that "where the law is unsettled at the time of trial but settled by the time of appeal, the 'plainness' of the error should be judged by the law at the time of appeal." *United States* v. *Escalante-Reyes*, 689 F.3d 415, 423 (5th Cir. 2012). Judge Smith, joined by Chief Judge Jones and Judge Clement, and joined in relevant part by Judge Garza, dissented on the ground that the plainness of an error should be judged based on the law at the time of forfeiture. See *id.* at 426-431. Judge Garza, joined by Chief Judge Jones and Judges King, Smith, and Clement, dissented on the ground that "[b]y creating an exception to the forfeiture rule in cases where an objection would have served an important function, * * * the majority has turned the basic rules of error preservation upside down." *Id.* at 454. Judge Owen dis-

sented on the ground that although in her view the error was plain, the error did not seriously affect the fairness, integrity, or public reputation of the proceedings in light of the facts of the case. *Id.* at 455.

SUMMARY OF ARGUMENT

In this case, the relevant law was unsettled at the time of sentencing, petitioner did not object and call the legal issue to the attention of the prosecutor and district court, and the court sentenced petitioner in a way that was debatably correct at the time but became clearly incorrect by the time of appeal. In those circumstances, the court of appeals correctly held that the error was not clear or obvious for purposes of plain-error review under Federal Rule of Criminal Procedure 52(b).

A. In federal criminal cases, a defendant ordinarily is precluded from challenging any error to which he did not timely object during his trial or sentencing. That requirement of a contemporaneous objection serves vital judicial interests, including the avoidance of inefficient appeals and remands by permitting district courts to remedy errors in the first instance. Rule 52(b) provides a limited and strictly circumscribed exception to that general rule by allowing courts to correct forfeited errors in exceptional circumstances involving particularly egregious mistakes. But the situation here—where the law is unsettled at the time of trial but clear by the time of appeal—is not an exceptional circumstance; rather, it is a common one. As a result, the text, structure, history, and purposes of Rule 52(b) all indicate that an error is not plain when the law is unsettled at the time the defendant forfeits his claim of error.

Rule 52(b) provides that "[a] plain error that affects substantial rights may be considered, even though it was

not brought to the court's attention." By its terms, the rule specifies that what is being "considered" and what was "not brought to the court's attention" are identical: "plain error." That reading of Rule 52(b)'s text is consistent with this Court's understanding of the rule as a remedy for error "so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States* v. *Frady*, 456 U.S. 152, 163 (1982). It is also consistent with Rule 52(b)'s restatement of existing law, which had applied the plain-error doctrine to forfeited errors whose plainness would have been the same at trial as on appeal. Moreover, it furthers each of the policies that underpins Rule 52(b) by promoting judicial economy, ensuring development of the record, safeguarding the district court's role as the court of first instance, minimizing strategic timing of objections, and allowing for correction of obvious miscarriages of justice.

B. Petitioner and his amicus are virtually silent with respect to the text, history, and purposes of Rule 52(b). But none of the considerations on which they do rely—not this Court's decision on Rule 52(b) in *Johnson* v. *United States*, 520 U.S. 461 (1997), nor its decision on retroactivity in *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), nor various policy rationales—supports the result petitioner seeks. *Johnson* relaxed the plain-error standard when a timely objection would be pointless under contrary controlling precedent, but that holding does not extend to cases like this one in which a timely objection could be quite helpful. Even assuming *Johnson* interprets the plain-error standard generally, it requires examining the purposes underlying Rule 52(b), and here those purposes cut strongly in favor of correct-

ing only forfeited errors whose plainness would have been apparent at trial. With respect to principles of retroactivity, they are relevant to the substantive law that applies at the first prong of plain-error review (*i.e.*, whether error occurred), but they shed no light on the second prong of plain-error review (*i.e.*, whether the error was obvious). Finally, the various policy rationales advanced by amicus lack merit and do not fully account for all of the purposes of plain-error review.

ARGUMENT

UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 52(b), AN ERROR IS NOT PLAIN WHEN THE LAW IS UNSETTLED AT THE TIME THE CLAIM OF ERROR IS FORFEITED

If a defendant in a criminal case forfeits a claim of error by failing to object at the time the error occurs, he may obtain relief on appeal only by satisfying the rigorous requirements of the plain-error standard set forth in Federal Rule of Criminal Procedure 52(b). That standard requires, among other things, that the error at issue be clear or obvious. See *United States* v. *Olano*, 507 U.S. 725, 734 (1993). The question presented here, which this Court reserved in *Olano*, is whether an error is obvious if "the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *Ibid.* Petitioner answers that question yes. He contends that the district court's sentence in this case should be reversed, even though he did not object at the time and even though his sentence was not obviously incorrect under then-existing law, because the court's sentencing error became clear by the time that he appealed.

That contention is at odds with the basic premise of the Federal Rules, which is that a defendant must pre-

serve his claim of error in the district court. Rule 52(b) provides a narrow and limited exception to that general rule when an objection would be futile (because the law is settled against the defendant) or when an objection should be unnecessary (because the error is obvious under existing law). But when the law is unsettled on a debatable legal question, that is the classic case when an objection can be helpful to the court and the parties. In that circumstance, a contemporaneous objection has all of its usual benefits, including that it may spur the court to avoid the error in the first place (as this case illustrates). Accordingly, Rule 52(b)'s text, structure, history, and purposes all indicate that an error is not plain if the law is unsettled at the time when the error occurs.

A. The Structure, Text, History, And Purposes Of Rule 52(b) Indicate That An Error Is Not Plain When The Law Is Unsettled At The Time Of Forfeiture

In federal criminal cases, a defendant ordinarily is precluded from challenging any error to which he did not timely object during his trial or sentencing. That requirement of a contemporaneous objection serves vital judicial interests. A central purpose is avoiding wasteful appeals and remands by permitting district courts to remedy errors in the first instance. Rule 52(b) provides a limited and strictly circumscribed exception to that general rule; it allows courts to correct forfeited errors in exceptional circumstances involving particularly egregious mistakes. But the situation here—where the law is unsettled at the time of trial but clear by the time of appeal—is not an exceptional circumstance. It is instead a common one, in which the failure to timely object precludes relief under Rule 52(b).

1. Rule 52(b) grants courts the limited authority to correct forfeited errors in exceptional circumstances involving particularly egregious mistakes

a. "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Olano*, 507 U.S. at 731 (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)); see *Frady*, 456 U.S. at 162-163. In criminal cases, that principle is embodied in Federal Rule of Criminal Procedure 51(b). That rule "tells parties how to preserve claims of error: 'by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection.'" *Puckett* v. *United States*, 556 U.S. 129, 135 (2009) (quoting Fed. R. Crim. P. 51(b)). "Failure to abide by this contemporaneous-objection rule ordinarily precludes the raising on appeal of the unpreserved claim of trial error." *Ibid.* (citing *United States* v. *Young*, 470 U.S. 1, 15 & n.12 (1985)).

Beyond Rule 51(b), the requirement of a contemporaneous objection appears throughout the Federal Rules of Criminal Procedure, many of which require a defendant to object to a particular aspect of the proceedings in order to preserve a claim of error. See, *e.g.*, Fed. R. Crim. P. 12(e) (requiring an objection for certain pretrial rulings); Fed. R. Crim. P. 15(g) (requiring an objection to deposition testimony); Fed. R. Crim. P. 29 (setting time limits for filing a motion for a judgment of acquittal); Fed. R. Crim. P. 30(d) (requiring an objection to jury instructions); Fed. R. Crim. P. 32(f) (requiring

the parties to object in writing to the Presentence Report within 14 days of issuance); Fed. R. Crim. P. 33(b) (setting time limits for filing a motion for a new trial). The same contemporaneous-objection requirement applies in the context of the Federal Rules of Civil Procedure and Evidence. See Fed. R. Civ. P. 46 (requiring an objection to rulings in a civil action); Fed. R. Evid. 103(a) (requiring an objection for evidentiary rulings).

As all of those Rules recognize, the requirement of a contemporaneous objection serves critical judicial interests. By objecting, a defendant "may prevent an error from happening in the first place, either because the judge sustains the defendant's objection or the prosecutor backs off, fearing that a trial-level victory might sow the seeds for a later appellate reversal." Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 Yale L.J. 922, 958 (2006) (Heytens); see *Puckett*, 556 U.S. at 134; *Wainwright* v. *Sykes*, 433 U.S. 72, 88 (1977). In addition, the district court "is ordinarily in the best position to determine the relevant facts and adjudicate the dispute." *Puckett*, 556 U.S. at 134. Timely objections therefore conserve scarce judicial resources and "reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *United States* v. *Dominguez Benitez*, 542 U.S. 74, 82 (2004).

Moreover, "even when the judge and prosecutor disagree with the defendant's view of the law, a timely objection will sometimes yield benefits by spurring the prosecutor to supplement the record, or prompting the trial court to seek additional information, make predicate factual findings, [] state on the record the basis for [the court's decision]," or provide alternative grounds for that decision. Heytens 958; see *Puckett*, 556 U.S. at

134; *Wainwright*, 433 U.S. at 89. Requiring a contemporaneous objection thus "ensures full development of the record, prevents strategic timing of objections meant to secure a 'second bite at the apple,' gives incentives for the diligence and zealousness of trial counsel and the defendant, minimizes the 'sandbagging' of trial courts, * * * and safeguards the district court's role as the court of first instance in our federal system." *United States* v. *Escalante-Reyes*, 689 F.3d 415, 434 (5th Cir. 2012) (Smith, J., dissenting); see *Puckett*, 556 U.S. at 134, 140.

As petitioner recognizes (Br. 9-10, 13), the basic difference between a defendant's preservation of a claim of error and forfeiture of the claim is reflected in Federal Rule of Criminal Procedure 52. When the defendant preserves his claim of error, it is governed by the harmless-error standard of Rule 52(a). See *Olano*, 507 U.S. at 731. But when the defendant forfeits his claim of error, it is governed by the more demanding plain-error standard of Rule 52(b). *Ibid.* The dividing line between Rule 52(a) and (b) is what occurred at the trial level—specifically whether the defendant raised a timely objection to the claimed error. See *id.* at 742 (Kennedy, J., concurring) (noting "the difference under Rule 52 between those cases where an objection has been preserved and those where it has not"). Broadly speaking, the issue here is whether what took place at trial—*i.e.*, whether an error was debatable or clear under the law at the time—continues to be relevant in determining whether an error is plain when applying Rule 52(b).

b. In construing Rule 52(b), this Court has recognized that it provides "a limited exception to" the preclusive effect of failing to preserve error at trial. *Puckett*,

556 U.S. at 135; see *id.* at 134 ("If an error is not properly preserved, appellate-court authority to remedy the error * * * is strictly circumscribed."). The Court has therefore long emphasized that the power to correct forfeited errors should be exercised only in "exceptional circumstances," *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936); it should be "used sparingly" to set aside only "particularly egregious errors," *Young*, 470 U.S. at 15 (quoting *Frady*, 456 U.S. at 163 & n.14). The Court has "repeatedly cautioned that '[a]ny unwarranted extension' of the authority granted by Rule 52(b) would disturb the careful balance it strikes between judicial efficiency and the redress of injustice." *Puckett*, 556 U.S. at 135 (quoting *Young*, 470 U.S. at 15). Satisfying the plain-error standard "is difficult, 'as it should be.'" *Ibid.* (quoting *Dominguez Benitez*, 542 U.S. at 83 n.9).

Rule 52(b) provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." To qualify for relief under that standard, a criminal defendant must establish there was "an error or defect * * * that has not been intentionally relinquished or abandoned"; the error was "clear or obvious, rather than subject to reasonable dispute"; and the error "affected [his] substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings." *Puckett*, 556 U.S. at 135 (internal quotation marks omitted). Even "if the above three prongs are satisfied," the court "has the *discretion* to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Ibid.* (internal quotation marks and brackets omitted).

c. The question presented here concerns the second prong of plain-error review, *i.e.*, whether a claimed legal error is clear or obvious. Specifically, the question is when during the criminal proceedings to assess the error's obviousness. In *Olano*, this Court recognized that, "[a]t a minimum," an error must be "clear under current law." 507 U.S. at 734. The *Olano* Court, however, expressly reserved judgment on the case "where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *Ibid.* In other words, the Court in *Olano* left open the question of whether a forfeited error must be obvious at the time when it occurs *as well as* at the time when it is considered for correction.

In *Johnson* v. *United States*, 520 U.S. 461 (1997), the Court addressed how to apply the plain-error rule when the law is settled against the defendant at the time of trial but changes in his favor by the time of appeal. The Court reasoned that requiring a defendant to object in that circumstance "would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent." *Id.* at 468. The Court thus held that "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration." *Ibid.*[3] As in *Olano*, however, the Court in *John-*

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[3] Justice Scalia did not join that portion of the Court's opinion finding the error to be plain, nor did he join the Court's discussion of whether the error (which was submitting the issue of materiality in a perjury prosecution to the judge rather than the jury) had affected the defendant's substantial rights. See *Johnson*, 520 U.S. at 463 n.*. The Court was unanimous, however, that even if the error had affected substantial rights, it did not warrant reversal of the defendant's conviction because

son did not address whether an error can be plain if the law is unsettled at the time of the error but becomes clear at some later point in the proceedings.

Petitioner and his amicus characterize the choice as between a time-of-trial rule and a time-of-appeal rule. See Pet. Br. i; NACDL Amicus Br. 3. Rule 52(b), however, applies equally at the trial level; it is not a rule of appellate procedure. See Fed. R. Crim. P. 1(a)(1); *Frady*, 456 U.S. at 179 (Brennan, J., dissenting) (noting that Rule 52(b) is "applicable to all stages of all criminal proceedings in federal courts"); *United States* v. *Thompson*, 27 F.3d 671, 673 (D.C. Cir.) (reviewing a claim raised for the first time in a post-verdict motion for plain error), cert. denied, 513 U.S. 1050 (1994). The issue here equally can face a district court, which may realize that an earlier ruling has become incorrect in light of an intervening decision from this Court or a court of appeals. The precise question is therefore whether (as petitioner contends) an error that is debatable when it is committed only needs to be plain at the time of its consideration or whether (as the government contends) an error must be plain both when it is committed and when it is later considered for correction.[4]

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the error had not seriously affected the fairness, integrity, or public reputation of the proceedings. See *id.* at 469-470.

[4] This case involves only a claim of sentencing error under *Tapia* v. *United States*, 131 S. Ct. 2382 (2011). It therefore does not present the question whether an error should be corrected on plain-error review, even when the law was unclear when the alleged error occurred, where an intervening decision establishes that the defendant was convicted "for an act that the law does not make criminal," which "inherently results in a complete miscarriage of justice." *Davis* v. *United States*, 417 U.S. 333, 346 (1974) (granting relief on that basis under 28 U.S.C. 2255); cf. *Frady*, 456 U.S. at 166 (making clear that "to obtain collateral relief a prisoner must clear a significantly higher hurdle than would

2. *The text of Rule 52(b) indicates that an error must be plain when it occurs to qualify for relief*

a. The text of Rule 52(b) indicates that an error must be plain both at the time of forfeiture and at the time of review. Rule 52(b) provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention."[5] By its terms, Rule 52(b) specifies two different times at which a "plain error" might be identified: first, at the time it occurs, when the obvious error could have been (but was not) "brought to the court's attention"; and, second, at some later point in time, when the obvious error may nonetheless be "considered." In each case, the subject that is "not brought to the court's attention" but may still be "considered" is identical: it is "plain error." Put another way, an error cannot be "considered" under Rule 52(b) unless it had the same character at the time of forfeiture as at the time of review: it must have been "plain" then as now.

Although the first clause of Rule 52(b) is phrased in the present tense—"plain error that affects substantial rights"—that does not mean the error only needs to be

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exist on direct appeal" under the plain-error rule); *Bousley* v. *United States*, 523 U.S. 614, 623 (1998) (noting that actual innocence is an exception to procedural default by failing to raise an issue on direct appeal). Petitioner's claim is not one of actual innocence based on an intervening decision.

[5] Until 2002, Rule 52(b) provided that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b) (1950). In 2002, Rule 52(b) was amended to delete the reference to "defects," but the amendment was "intended to be stylistic only" and did not alter the rule's meaning. Fed. R. Crim. P. 52(b) advisory committee's note (2002 Amendments).

plain at the time of review. Such a reading would fail to account for Rule 52(b)'s second clause, which states that a plain error may be considered, "*even though it was not brought to the court's attention.*" Fed. R. Crim. P. 52(b) (emphasis added). The second clause is backward-looking; it uses the past tense to indicate that what is being "considered"—"plain error"—is the same thing that "was not brought to the court's attention." The second clause thus signals that the error subject to correction has retained its plain character from the time of forfeiture to the time of review. Cf. *Greene* v. *Fisher*, 132 S. Ct. 38, 44 (2011) (use of "backward-looking language" in federal habeas statute required assessing law as of the time that state courts rendered their decision).

In *Escalante-Reyes*, the court of appeals asserted that "a more natural reading" of the second clause "is that 'it' refers back" only to the noun "error" and not to the entire antecedent noun phrase "plain error that affects substantial rights." 689 F.3d at 419. But the court offered nothing in support of that assertion, nor has any other court to adopt petitioner's reading done so based on the text of Rule 52(b). A pronoun is a substitute for a noun or noun phrase whose referent is named or understood in context. See, *e.g.*, *The Cambridge Encyclopedia of the English Language* 467 (2d ed. 2003). Here, nothing suggests that the pronoun "it" in the second clause plucks out only the noun "error" in the first clause as a referent; rather, the pronoun "it" refers naturally in context to the entire antecedent noun phrase, "plain error that affects substantial rights." Accordingly, the ordinary meaning of Rule 52(b) indicates that an error must be "plain" both when "it was not brought to the court's attention" and when it is subsequently "considered" for correction.

b. That reading of Rule 52(b)'s text is consistent with this Court's understanding of the plain-error rule. In *Frady*, the Court stated that "recourse may be had to [Rule 52(b)] only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." 456 U.S. at 163. The courts of appeals have often repeated that characterization of the narrow scope of plain-error review. See, *e.g.*, *United States* v. *Delgado*, 672 F.3d 320, 330 (5th Cir. 2012) (en banc), petition for cert. pending, No. 11-10492 (filed May 22, 2012); *United States* v. *Turner*, 651 F.3d 743, 748 (7th Cir.), cert. denied, 132 S. Ct. 863 (2011); *United States* v. *Boyd*, 640 F.3d 657, 669 (6th Cir.), cert. denied, 132 S. Ct. 271 (2011); *United States* v. *King*, 559 F.3d 810, 814 (8th Cir.), cert. denied, 130 S. Ct. 167 (2009); *United States* v. *Villafuerte*, 502 F.3d 204, 209 (2d Cir. 2007).

That focus on participants in the trial court proceedings necessarily forecloses relief under the plain-error standard when an error becomes "plain" only at some later point in time. As the Ninth Circuit has explained, plain error is "error that is so clear-cut, so obvious, a competent district judge should be able to avoid it without benefit of objection." *United States* v. *Turman*, 122 F.3d 1167, 1170 (1997). District judges are expected to be "knowledgeable, not clairvoyant." *Ibid.* "When the law is such that an experienced district judge cannot be expected to detect the error on his own, that is precisely when it is most important for the parties to object." *Ibid.* Or as the Fourth Circuit has put it, "[i]f the contemporaneous objection requirement is to have any real force, presumably an objection would be required (and review would be barred for failure to object) in the

circumstance where the law at the time of trial is unclear as to whether the district court's proposed course would constitute error." *United States* v. *David*, 83 F.3d 638, 643 (1996).

More generally, treating an error as plain on appeal even though it was debatable at trial would be at odds with this Court's restrictive approach to plain-error review. The courts of appeals repeatedly have recognized that, under this Court's plain-error decisions, "only the clearest and most serious of forfeited errors should be corrected on appellate review." *United States* v. *Padilla*, 415 F.3d 211, 223 (1st Cir. 2005) (en banc); see *United States* v. *Robinson*, 627 F.3d 941, 956 (4th Cir. 2010) ("Plain error review exists to correct only the most grievous of unnoticed errors."); *United States* v. *Conley*, 291 F.3d 464, 470 (7th Cir. 2002) ("It is well-established that the plain error standard allows appellate courts to correct only particularly egregious errors for the purpose of preventing a miscarriage of justice."). Plain-error review "concentrates on 'blockbusters'" and "notice[s] unpreserved errors only in the most egregious circumstances." *United States* v. *Taylor*, 54 F.3d 967, 972-973 (1st Cir. 1995).

Nothing exceptional or egregious characterizes the circumstance presented here, *i.e.*, when the relevant law was unclear at the time of trial and no objection was made to the prosecutor's actions or court's ruling, but it has become clear by the time of appeal that the prosecutor or judge erred. That circumstance is not only commonplace in federal criminal cases; it is a structural feature of a tiered judicial system with appellate review. Parties are expected to develop the law by alerting trial courts to their positions on open issues and appealing if courts do not resolve the issues in their favor. It is un-

exceptional for a judge to overlook an issue not resolved by precedent when no one raises it. The fact that petitioner claims a type of error that is routine, and that a reasonably experienced district judge could not have anticipated it under then-existing law, confirms what the text of Rule 52(b) says: it is not the sort of "plain error" that although "not brought to the court's attention" may still be "considered."

3. The history of plain-error review and Rule 52(b) confirms that an error must be plain when it occurs to qualify for relief

a. In *Atkinson*, the Court explained that the plain-error doctrine provides for only limited review of forfeited claims. The Court emphasized that unpreserved errors ordinarily do not merit reversal, based on "considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact." 297 U.S. at 159. Although the Court recognized that forfeited errors may be corrected "[i]n exceptional circumstances, especially in criminal cases," the Court placed strict and familiar limits on such review: the forfeited errors must be "obvious" and they must "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Id.* at 160. On the facts of *Atkinson* itself, the Court found that standard unmet and declined to grant relief. See *ibid.*

In 1944, eight years after *Atkinson*, Rule 52(b) was adopted as part of the original Federal Rules of Criminal Procedure. As both this Court and the Advisory Committee have stated, Rule 52(b) "was intended as 'a restatement of existing law.'" *Olano*, 507 U.S. at 731 (quoting Fed. R. Crim. P. 52(b) advisory committee's

note (1944 Adoption)). Rule 52(b) thus codified "the standard laid down in [*Atkinson*]," and as a result this Court "repeatedly ha[s] quoted the *Atkinson* language in describing plain-error review." *Id.* at 736 (quoting in part *Young*, 470 U.S. at 7); see *Young*, 470 U.S. at 15 (referring to principles in *Atkinson* to describe plain-error review); *Frady*, 456 U.S. at 163 n.13 (same); *Silber* v. *United States*, 370 U.S. 717, 718 (1962) (per curiam) (same); *Johnson* v. *United States*, 318 U.S. 189, 200 (1943) (same); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940) (same).

At the time Rule 52(b) was adopted, this Court applied the plain-error doctrine to errors that would have been as incorrect at trial as on appeal. As far as the government is aware, in this Court's pre-1944 cases involving the plain-error rule, the putative errors at issue would have been obviously incorrect both at trial and on appeal (if they were obviously incorrect at all).[6] None of those cases appears to have involved any relevant change of law between the time of trial and appeal. Nor has petitioner or his amicus pointed to any pre-1944 decision in which this Court considered, let alone granted

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[6] See, *e.g.*, *Mahler* v. *Eby*, 264 U.S. 32, 45 (1924) (plain-error review of a defective deportation warrant); *Pierce* v. *United States*, 255 U.S. 398, 406 (1921) (plain-error review of an award of interest that was inconsistent with the governing statute and common-law rule); *Crawford* v. *United States*, 212 U.S. 183, 193-194 (1909) (plain-error review of a juror's qualifications); *Clyatt* v. *United States*, 197 U.S. 207, 221-222 (1905) (plain-error review of sufficiency of the evidence to sustain defendants' convictions); *Wiborg* v. *United States*, 163 U.S. 632, 658-660 (1896) (plain-error review of sufficiency of the evidence to sustain defendants' convictions); cf. *Hemphill* v. *United States*, 312 U.S. 657, 657 (1941) (remanding two cases for the court of appeals to consider whether there was sufficient evidence to sustain the defendants' convictions).

relief for, an error that became obvious only on appeal. That is why when Rule 52(b) was adopted to restate existing law, it was natural for the rule to state that "plain error" could have been (but was not) "brought to the court's attention." Fed. R. Crim. P. 52(b).

b. The drafting history of Rule 52(b) confirms that understanding. A plain-error rule was not included in the Advisory Committee's initial preliminary draft in May 1942, but at this Court's suggestion, the Committee included such a rule in a subsequent preliminary draft in May 1943. See 1 *Drafting History of the Federal Rules of Criminal Procedure* 13, 24 (Madeleine J. Wilken & Nicholas Triffin eds., 1991) (*Drafting History*); Advisory Comm. on Rules of Criminal Procedure, *Federal Rules of Criminal Procedure, Preliminary Draft* 117, 197 (May 1943) (*1943 Preliminary Draft*), reprinted in *Drafting History*. The rule stated that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *Ibid.* Like the text of the current version, the language of the 1943 version permitted "[p]lain errors or defects" to be "noticed" even though "they were not brought to the attention of the court." From the beginning of the rule, then, it has been "[p]lain errors or defects" that could have been (but were not) "brought to the attention of the court."

In addition, the Advisory Committee Note accompanying the draft rule cited several cases applying plain-error review, but as explained above, those cases involved errors whose plainness would not have changed between trial and appeal. The Advisory Committee acknowledged that "[t]he concept of plain error has served to relieve the harshness of the general rule that an appellate court will not consider alleged errors to which

objection and exception were not interposed at the trial." See *1943 Preliminary Draft* 198, reprinted in *Drafting History*. But the Advisory Committee also emphasized that "justice to [subordinate] courts requires that their alleged errors should be called directly to their attention, and their errors should not be reversed upon questions which the astuteness of counsel has evolved from the record." *Ibid.* (quoting *Robinson & Co.* v. *Belt*, 187 U.S. 41, 50 (1902)). The Advisory Committee thus recognized that "justice to [subordinate] courts" meant only "revers[ing]" them in narrow circumstances. See *Robinson & Co.*, 187 U.S. at 50 (declining to reverse judgment on plain-error review).

By the time the plain-error rule was adopted the following year, the Advisory Committee had replaced much of the draft note with the statement that the rule "[was] a restatement of existing law." Fed. R. Crim. P. 52(b) advisory committee's note (1944 Adoption). But the Advisory Committee Note retained citations to *Wiborg* v. *United States*, 163 U.S. 632 (1896), and *Hemphill* v. *United States*, 312 U.S. 657 (1941)—both of which dealt with sufficiency-of-the-evidence questions, not errors whose plainness could conceivably have changed between trial and appeal. In the end, this Court's pre-1944 cases do not suggest that the plain-error rule extends to trial errors that were debatably correct at the time (although they are clearly incorrect now), and in fact Rule 52(b)'s text and the legal landscape that it codified point in the opposite direction.

c. Petitioner contends that it is not possible to discern the "legislative intent" underlying Rule 52(b) because the Federal Rules of Criminal Procedure "are not the product of legislative committees." Br. 6 (emphasis omitted). This Court, however, has recognized that "the

Advisory Committee Notes provide a reliable source of insight into the meaning of a rule, especially when, as here, the rule was enacted precisely as the Advisory Committee proposed." *United States* v. *Vonn*, 535 U.S. 55, 64 n.6 (2002); see *Corley* v. *United States*, 556 U.S. 303, 321 (2009) (observing that "[t]he Advisory Committee's Notes * * * were before Congress when it enacted the Rules of Evidence and * * * we have relied on [them] in the past to interpret the rules"); *Herrera* v. *Collins*, 506 U.S. 390, 409 & n.7 (1993) (discussing drafting history of Federal Rule of Criminal Procedure 33).

Indeed, the Court has looked to Rule 52(b)'s history, including the Advisory Committee Notes, in interpreting that rule in the past. See *Greenlaw* v. *United States*, 554 U.S. 237, 247 (2008) ("Nothing in the text or history of Rule 52(b) suggests that the rulemakers, in codifying the plain-error doctrine, meant to override the cross-appeal requirement."); *Olano*, 507 U.S. at 731 (relying on the Advisory Committee Notes to Rule 52(b)); *Young*, 470 U.S. at 15 n.12 (conducting "[a] review of the drafting that led to" Rule 52(b)). It is therefore relevant that Rule 52(b) was a restatement of existing law, and this Court's cases at the time had not extended the plain-error doctrine to situations in which the error was debatable at trial but had become clear by the time of appeal.

d. Surveying some of those pre-1944 decisions, petitioner asserts (Br. 9-11, 36) that the purpose of the plain-error rule is to remedy injustice. That is certainly one purpose of the plain-error rule, but it has other purposes as well, among them "considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact."

Atkinson, 297 U.S. at 159. The plain-error rule furthers those interests in finality and judicial economy by permitting the correction of forfeited errors only in "exceptional circumstances." *Id.* at 160. Petitioner wants to take the sweet without the bitter. And unless Rule 52(b) provides a remedy for every mistake at trial, then petitioner must still explain why the type of error at issue here falls within the ambit of the rule.

Petitioner cites (Br. 10) this Court's decision in *Wiborg*, but there the Court simply set aside the convictions of two defendants for insufficiency of the evidence. See 163 U.S. at 659. Petitioner also cites (Br. 11) the dissent in *O'Neil* v. *Vermont*, 144 U.S. 323 (1892), but there the Court dismissed for want of a federal question (while noting that petitioner had failed to preserve his claim of error under state law). See *id.* at 336-337. Accordingly, neither *Wiborg* nor *O'Neil* casts any doubt on the state of the law leading up to *Atkinson* and the adoption of Rule 52(b). If anything, *Wiborg* and other plain-error cases only confirm that the doctrine historically applied to errors that were plain both at the time of forfeiture and at the time of review.

4. Requiring an error to be plain at the time it occurs furthers the purposes of the plain-error doctrine

Requiring an error to be plain at the time of forfeiture encourages defendants to object in circumstances where a timely objection might prevent error from occurring in the first place. See, *e.g.*, *Dominguez Benitez*, 542 U.S. at 82 ("[T]he [plain-error] standard should enforce the policies that underpin Rule 52(b) generally, to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error."). In addition to promoting judicial

economy by reducing appeals and remands, requiring an error to be plain at the time of forfeiture also ensures full development of the record, safeguards the district court's role as the court of first instance, minimizes strategic timing of objections and "sandbagging" of trial courts, and allows for correction of obvious miscarriages of justice. See *Puckett*, 556 U.S. at 140; *Escalante-Reyes*, 689 F.3d at 434 (Smith, J., dissenting).

a. As a threshold matter, the narrowly tailored forfeiture provisions of Rule 52(b) provide the means for enforcing the contemporaneous-objection requirement. See *Puckett*, 556 U.S. at 134. If a defendant who has failed to lodge a contemporaneous objection in the district court is unable to satisfy all four demanding prongs of the plain-error standard, he is not entitled to any relief. "This limitation on appellate-court authority serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them." *Ibid.* In this way, the forfeiture rule gives teeth to the contemporaneous-objection requirement by providing a high hurdle to obtain review of unpreserved claims, while allowing for the correction of "only 'particularly egregious errors.'" *Young*, 470 U.S. at 15 (quoting *Frady*, 456 U.S. at 163); see Daniel J. Meltzer, *State Court Forfeiture of Federal Rights*, 99 Harv. L. Rev. 1128, 1135 (1986) (forfeiture provisions supply "a necessary bite" to claim-preservation rules).

Interpreting Rule 52(b) to require that an error be plain at the time of forfeiture when the law is then unsettled serves all of the purposes underlying the contemporaneous-objection requirement. Most importantly, a defendant who objects in the face of unsettled law "may prevent an error from happening in the first place, either because the judge sustains the defendant's

objection or the prosecutor backs off, fearing that a trial-level victory might sow the seeds for a later appellate reversal." Heytens 958; see *Puckett*, 556 U.S. at 134 ("In the case of an actual or invited procedural error, the district court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome."); *Wainwright*, 433 U.S. at 88 ("A contemporaneous-objection rule may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality in criminal litigation.").

This case is an excellent example. Petitioner, who was 26 years old at sentencing, admitted to using marijuana since he was 14 and to doing so "daily prior to his arrest for the instant offense." PSR para. 39. In a letter to the Probation Office, petitioner stated that he "ha[d] had a drug problem for many years," "was never in a drug treatment program," and "may very well benefit from such a program at this point in his life." 10-30571, Document No. 511313422, at 1 (5th Cir. Dec. 6, 2010). In a subsequent sentencing memorandum to the district court, petitioner further stated that he "need[ed] professional treatment for drug abuse" and urged the court to "do whatever [was] in its power to have treatment ordered for [him]." *Id.* at 8. At the sentencing hearing, petitioner again emphasized to the court his "need for that drug treatment." Doc. No. 54, at 5.

At that hearing, the district court was candid about the "dilemma" it faced: a term of imprisonment within the advisory Guidelines range would not leave petitioner in federal custody long enough to qualify for placement in the Bureau of Prisons' 500-hour Residential Drug Abuse Program. Doc. No. 54, at 12-13, 16, 21. The court therefore questioned whether it should order a longer period of imprisonment "because he needs that treat-

ment," or instead "shorten [petitioner's] sentence just to get him out of the system more quickly?" *Id.* at 16-17. Although the court was inclined to lengthen petitioner's sentence, the court invited petitioner's counsel to comment. See *id.* at 17. At that point, if counsel had raised 18 U.S.C. 3582(a), which states that "imprisonment is not an appropriate means of promoting correction and rehabilitation," it is entirely possible that the court would not have imposed an above-Guidelines sentence. Similarly, when the court later asked petitioner's counsel for "any reason why th[e] sentence as stated should not be imposed," and counsel replied, "[p]rocedurally, no," that deprived the court of an opportunity to avoid its error. Doc. No. 54, at 30.

Nor was petitioner foreclosed from objecting under then-existing law. Petitioner was sentenced on June 2, 2010, about a month before the petition for a writ of certiorari was filed in *Tapia* v. *United States*, 131 S. Ct. 2382 (2011). At that time, there was a conflict among the circuits regarding whether rehabilitation could be used as a factor in determining the length of a defendant's prison sentence. See Pet. at 2, *Tapia*, *supra* (No. 10-5400); Gov't Br. in Opp. at 7-8, *Tapia*, *supra* (No. 10-5400). The Fifth Circuit had not addressed the question, see Pet. App. 4a, which meant that had petitioner objected, it would have "alert[ed] the district court to potential error at a moment when the court [could have taken] remedial action." *United States* v. *Mouling*, 557 F.3d 658, 664 (D.C. Cir.), cert. denied, 130 S. Ct. 795 (2009). "Thus the interest in requiring parties to present their objections to the trial court, which underlies plain error review, applies with full force." *Ibid.*; see *Turman*, 122 F.3d at 1170 ("An objection affords the judge an opportunity to focus on the

issue and hopefully avoid the error, thereby saving the time and expense of an appeal and retrial.").

b. In addition, even when a defendant's objection is not successful, "a timely objection will sometimes yield benefits by spurring the prosecutor to supplement the record, or prompting the trial court to seek additional information, make predicate factual findings, [] state on the record the basis for [the court's decision]," or provide alternative grounds for that decision. Heytens 958; see *Puckett*, 556 U.S. at 134; *Wainwright*, 433 U.S. at 89. All of those outcomes not only further the public interest in the finality of criminal litigation, but they also "safeguard[] the district court's role as the court of first instance in our federal system." *Escalante-Reyes*, 689 F.3d at 434 (Smith, J., dissenting). The district court "is ordinarily in the best position to determine the relevant facts and adjudicate the dispute." *Puckett*, 556 U.S. at 134. Requiring a contemporaneous objection when the law is unsettled ensures that the district court is able to develop a complete factual and legal record for appellate review.

Indeed, when the governing law is unclear at the time of trial, that is precisely when a contemporaneous objection is most necessary. See *Turman*, 122 F.3d at 1170 ("When the law is such that an experienced district judge cannot be expected to detect the error on his own, that is precisely when it is most important for the parties to object."); *David*, 83 F.3d at 643 (observing that when the law is unsettled at the time of trial, that "is precisely the circumstance where it is most obvious that [plain-error] review should not be authorized"). As the Fourth Circuit has explained, "[i]f the contemporaneous objection requirement is to have any real force, presumably an objection would be required (and review would

be barred for failure to object) in the circumstance where the law at the time of trial is unclear as to whether the district court's proposed course would constitute error." *Ibid.* When the legal issue is open and debatable, a timely objection provides the district court with an opportunity to consider and address it—which is a central purpose of the contemporaneous-objection requirement. *Ibid.*

c. Requiring an error to be plain at the time of forfeiture also minimizes strategic timing of objections and "sandbagging" of trial courts. See *Puckett*, 556 U.S. at 134 ("[T]he contemporaneous-objection rule prevents a litigant from "'sandbagging'" the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor."); *David*, 83 F.3d at 643. To be sure, there is no evidence in this case to indicate that petitioner was aware of his objection and withheld it for any reason. Petitioner moved to correct his sentence eight days after the sentencing hearing, which may mean only that petitioner belatedly realized that he had a potentially meritorious objection to his sentence. But a case like this one will be impossible to distinguish from one in which a defendant belatedly objects because he is displeased with the sentence once pronounced. See *Vonn*, 535 U.S. at 72. And, in any event, it would not distinguish this case from any other case in which a defendant fails to timely object on grounds that might have been sustained.

d. Finally, requiring an error to be plain at the time of forfeiture permits courts to remedy the obvious miscarriages of justice for which Rule 52(b) is designed. Plain-error review "is not a run-of-the-mill remedy." *Frady*, 456 U.S. at 163 n.14 (internal quotation marks omitted). Rather, it corrects "only 'particularly egre-

gious errors.'" *Young*, 470 U.S. at 15 (quoting *Frady*, 456 U.S. at 163); see *Atkinson*, 297 U.S. at 160 (courts' authority to correct forfeited errors should be exercised only in "exceptional circumstances"). That characterization does not readily describe a sentencing practice—*i.e.*, using rehabilitation as a factor in determining the length of a defendant's term of imprisonment—that appears to have been common for an extended period of time and that inspired different views among courts of appeals during the 1990s and 2000s. Of the defendants affected by that practice whose sentences became final before *Tapia* was decided, petitioner has no special claim to more favorable treatment; to the contrary, he did not preserve his claim and thus deprived the district court, the court of appeals, and even this Court of the opportunity to address the question and clarify the law.

The need for error correction in the service of justice is at its lowest ebb in this context. When the law is clearly settled in favor of a defendant (and thus an objection by his counsel should be unnecessary), or when the law is clearly settled against a defendant (and thus an objection by his counsel should be futile), the ends of justice may warrant correction of the error (if the defendant can satisfy the remaining prongs of the plain-error standard), because the integrity of the proceedings has been called into question by an error that the prosecutor and court should not have countenanced or by an error that the defendant was powerless to prevent. By contrast, when the law is unsettled at the time of the district court proceedings, the prosecutor and the court have not been "derelict" in allowing the error to happen, and the defendant had a ready means of attempting to avoid the error. *Frady*, 456 U.S. at 163. In that circumstance, treating the error as plain "would disturb the

careful balance [Rule 52(b)] strikes between judicial efficiency and the redress of injustice." *Puckett*, 556 U.S. at 135.

B. The Arguments Of Petitioner And His Amicus That The Plainness Of An Error Should Be Assessed Only At The Time Of Review Lack Merit

Petitioner and his amicus are virtually silent with respect to the text, structure, and history of Rule 52(b). But none of the legal considerations on which they do rely—not this Court's decision on Rule 52(b) in *Johnson*, nor principles of retroactivity, nor various policy rationales—requires a different result.

1. This Court in Johnson *relaxed the plain-error standard only in cases, unlike this one, where an objection would be pointless under settled contrary law*

a. Petitioner acknowledges (Pet. 7) that this Court's decision in *Johnson* leaves open the question presented here. His amicus, however, argues that *Johnson*, which concerned cases "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal," 520 U.S. at 468, should apply equally to cases like this one in which the law at the time of forfeiture was unsettled. See NACDL Amicus Br. 4-6. But even courts that have adopted petitioner's interpretation of Rule 52(b) have recognized that "*Johnson* brings no clarity to cases" in which the law is unsettled at the time of forfeiture but becomes clear at some later point in the proceedings. *United States* v. *Cordery*, 656 F.3d 1103, 1107 (10th Cir. 2011); see *Escalante-Reyes*, 689 F.3d at 420. This Court in *Johnson* relaxed the plain-error standard when a contemporaneous objection would be pointless under contrary controlling precedent, but that does not justify a further modification when a contemporaneous

objection, far from being pointless, could serve a number of important objectives.

In *Johnson*, the defendant was charged with perjury for making false statements to a grand jury. See 520 U.S. at 463. At the close of the trial, the district court determined that the defendant's statements were material, which was consistent at the time with "near-uniform precedent both from this Court and from the [c]ourts of [a]ppeals." *Id.* at 464, 467-468 & n.1. The jury then found the defendant guilty of perjury. See *id.* at 464. Following the defendant's conviction but before her appeal, this Court held in *United States* v. *Gaudin*, 515 U.S. 506 (1995), that the element of materiality in a false-statement prosecution under 18 U.S.C. 1001 must be submitted to the jury rather than decided by the trial judge. See *Johnson*, 520 U.S. at 464. The defendant in *Johnson* therefore contended on appeal that the district court's failure to submit the issue of materiality to the jury constituted reversible plain error under Rule 52(b). *Ibid.*

This Court disagreed. It held that the district court's error had not seriously affected the fairness, integrity, or public reputation of the proceedings, because the evidence supporting materiality was overwhelming. See *Johnson*, 520 U.S. at 469-470. The Court agreed with the defendant, however, that she had satisfied the second prong of plain-error review, *i.e.*, that the district court's error was clear and obvious. See *id.* at 467-468. In light of the "near-uniform precedent" from this Court and the courts of appeals, any objection at trial from the defendant would have been pointless. Requiring an objection in that circumstance, the Court explained, "would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that

were plainly supported by existing precedent." *Id.* at 468. The Court concluded "that in a case such as this—where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration." *Ibid.*

b. It is clear from the Court's discussion in *Johnson* that it did not resolve cases like this one in which the law is unsettled at the time of forfeiture. The Court began by recognizing that "*Olano* refrained from deciding when an error must be plain to be reviewable." 520 U.S. at 467 (emphasis omitted). "'At a minimum,' *Olano* [had] concluded, the error must be plain 'under current law.'" *Ibid.* But that left the question of whether the error also had to be plain at the time it occurred. The Court in *Olano* had expressly reserved judgment on that question, declining to address cases "where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." 507 U.S. at 734. And the Court in *Johnson* did not address the question either. The *Johnson* Court could have announced a rule that would govern cases (like that one) in which the law was settled at the time of forfeiture *and* cases (like this one) in which the law was unsettled at the time of forfeiture. But the *Johnson* Court took care to limit its holding to a "case such as this—where the law at the time of trial was settled and clearly contrary to the law at the time of appeal." 520 U.S. at 468.

The Court in *Johnson* had good reason not to extend its holding to cases in which the relevant law is unsettled at the time of forfeiture. When the law is settled against a defendant at the time of trial, requiring her to object would result in "a long and virtually useless laundry list

of objections." *Johnson*, 520 U.S. at 468. Absent the rule in *Johnson*, the defendant would have to object and preserve her claim of error; otherwise, in the event of a change in the applicable law, the defendant would be unable to seek a remedy under Rule 52(b): the error would not have been plain at the time of forfeiture, and thus the defendant would never be able to satisfy the second prong of plain-error review. By contrast, when the law is unsettled at trial, the need for a contemporaneous objection is at its zenith: it allows the trial court to address the potential error in the first instance, which serves a host of important interests. See, *e.g.*, *Mouling*, 557 F.3d at 664. The rationale of *Johnson* thus provides no basis for relaxing the plain-error standard in cases where a contemporaneous objection, far from being pointless or futile, could be quite useful. Indeed, the considerations of judicial economy that drove the Court's analysis in *Johnson* cut in precisely the opposite direction here.

c. Amicus argues (Br. 4-6) that *Johnson* interpreted the text of Rule 52(b) to measure plainness at the time of appeal and the rule's text cannot be given a different meaning in this case. No court of appeals has accepted that argument and held that petitioner's interpretation is compelled by *Johnson*. That is because *Johnson* did not discuss the text of Rule 52(b) or this Court's previous recognition that Rule 52(b) is a remedy for egregious errors clear at the time they occurred. See *Frady*, 456 U.S. at 163. Rather, *Johnson* rested its holding instead on a concern with judicial economy—*i.e.*, parties should not be required to make futile objections in the face of contrary settled precedent—that does not apply in this context. Amicus cites (Br. 4) *Clark* v. *Martinez*, 543 U.S. 371 (2005), but the Court in *Johnson* did not

give the text of Rule 52(b) a limiting construction based on constitutional concerns that now must govern other applications of the rule. Rather, *Johnson* relaxed the general rule that an error must be plain at the time of forfeiture, and it did so to cover a particular circumstance: when a timely objection would have been futile in the face of contrary controlling precedent.

It does not matter whether *Johnson* is viewed as describing an exception to the plain-error standard or as interpreting that standard generally. *Johnson* should not be read as foreclosing consideration of Rule 52(b)'s text and history in addition to its purposes; but even assuming that *Johnson* implicitly regarded the text and history of Rule 52(b) as not controlling of the analysis, and held instead that whether an error is "plain" for purposes of Rule 52(b) rests solely on policy concerns (like judicial economy), the Court's opinion makes clear that those policy concerns can change depending on the context. Amicus cannot have it both ways, by taking off the interpretive table everything but the rule's purposes and then foreclosing an examination of how those purposes are best served in this particular context (*i.e.*, when the relevant law is unsettled at the time of trial). At the very least, *Johnson* requires asking whose interpretation—petitioner's or the government's—enforces the policies that underpin Rule 52(b).

That question is not a close one. The plain-error doctrine encourages contemporaneous objections primarily because of the efficiency gains in remedying potential errors on the spot. A defendant who fails to object therefore will not be able to raise an error for the first time on appeal, unless the error was plain at the time it occurred, it affected his substantial rights, and it seriously affected the fairness, integrity, or public reputa-

tion of judicial proceedings. If those conditions are satisfied, the plain-error doctrine recognizes important countervailing interests, such as encouraging prosecutors and judges to avoid obvious miscarriages of justice. The efficiency gains that form the basis for the plain-error rule, however, are cancelled out in a case like *Johnson*, because it would be inefficient to require parties to object when the objection is futile. That would only bog down trial proceedings. But those same gains are not cancelled out in a case like this one, where an objection would not have been useless and in fact could have been quite helpful. Accordingly, in that circumstance, neither *Johnson*'s holding nor its rationale provides any basis for assessing the plainness of an error solely at the time of review.

2. Principles of retroactivity bear on the existence of error but not on the obviousness of that error

a. Petitioner and his amicus contend that the retroactivity principles of *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), require measuring the plainness of an error solely at the time of review under Rule 52(b). See Pet. Br. 23-31; NACDL Amicus Br. 8-10. That is incorrect. *Griffith* holds that a ruling of this Court applies to all criminal cases that are not final at the time the ruling is announced, whether or not the decision makes a "clear break" with prior law. 479 U.S. at 328. *Griffith* thus dictates the substantive law that applies to the disposition of criminal cases pending on direct appeal. It does not bear, however, on whether error committed on an earlier occasion is clear or obvious. In other words, *Griffith* is relevant to the first prong of plain-error review (*i.e.*, whether there has been an error), but it is not

relevant to the second prong of plain-error review (*i.e.*, whether the error is clear or obvious).

In *Griffith* itself, the defendants had preserved their claims of error at trial, see 479 U.S. at 317, 319, and as a result the Court had no reason to address the relationship between retroactivity and forfeiture principles. Nothing in *Griffith* suggests that a defendant who has forfeited a claim of error is excused, once favorable new precedent appears, from satisfying the remaining three components of the plain-error test. The Court, however, did address the relationship between retroactivity and forfeiture in *Johnson*, because there the defendant had not preserved her claim of error at trial. In *Johnson*, the Court found error under the first prong of plain-error review, because *Griffith* required application of the intervening decision in *Gaudin*. See 520 U.S. at 467. But in assessing the second prong of plain-error review—whether the error was clear or obvious—the Court made no mention of *Griffith*. See *id.* at 467-468. If petitioner and amicus were correct that *Griffith* requires measuring the plainness of an error at the time when the error is reviewed under Rule 52(b), the Court in *Johnson* would have said so.

For those reasons, courts and commentators correctly have recognized that *Griffith* is not relevant to the question presented here. See, *e.g.*, *Escalante-Reyes*, 689 F.3d at 420 n.4 ("[I]n *Johnson*, the Supreme Court applied *Griffith* to the first prong of plain error analysis, *not* the second prong."); *David*, 83 F.3d at 643 n.6 ("*Griffith*'s holding that a defendant whose direct appeal is pending receives the benefit of a new rule for purposes of determining whether the district court erred, bears not at all on the second requirement of *Olano*, that the error be 'plain.'"); see also Heytens 954 (explaining

that forfeiture rules "are themselves part of the presently existing 'law' that reviewing courts must apply" under *Griffith*); *id.* at 955 ("In short, *Griffith* has nothing to say about the proper method for applying plain error review when judicial understandings of the law's requirements have changed between the time of trial and appellate review.").[7]

b. Amicus incorrectly argues (Br. 8-10) that requiring an error to be plain at the time of forfeiture (when the law was then unsettled) contravenes *Griffith*'s goal of "treating similarly situated defendants the same." 479 U.S. at 327. A defendant who preserves an objection is not similarly situated to one who does not. See *David*, 83 F.3d at 643 n.6 ("[A] defendant who objects to an alleged error (as did the defendant in *Griffith*) is not similarly situated to a defendant who did not, and so a new rule created for the former need not be deemed plain for the latter."). In *Griffith*, the defendants had preserved their claims of error at trial; by permitting them to rely on an intervening case won by another defendant, the Court ensured that "the fortuities of the judicial pro-

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[7] Professor Heytens acknowledges that the government's interpretation of the plain-error standard in this case is "fully consistent with Rule 52(b)'s text" and serves "all three purposes of claim-presentation rules—avoiding error, deterring sandbagging, and creating a complete record," but he endorses petitioner's interpretation on the ground that this Court should revisit *Griffith* and use selective prospectivity rather than forfeiture rules to determine the impact of its decisions on pending cases. Heytens 969, 980-990. Petitioner, however, has neither challenged *Griffith* nor called for that sort of sea change in this Court's retroactivity doctrine. Petitioner relies (Br. 35) on another law review article, see Alison L. LaCroix, *Temporal Imperialism*, 158 U. Pa. L. Rev. 1329 (2010), but that article describes the history of certain temporal doctrines (including retroactivity) without discussing at all the specific question presented here.

cess"—*i.e.*, the happenstance of which case was selected for plenary review—did not determine the defendants' entitlement to relief. 479 U.S. at 327. But distinguishing between defendants who preserve claims of error and those who forfeit them does not make relief turn on circumstances beyond their control. Rather, it "encourage[s] all trial participants to seek a fair and accurate trial the first time around." *Young*, 470 U.S. at 15 (quoting *Frady*, 456 U.S. at 163).

Likewise, a defendant who forfeits an objection in the face of unsettled law is not similarly situated to a defendant who forfeits an objection in the face of settled, contrary law. The former expends scarce judicial resources by withholding a potentially successful objection that could serve several valuable purposes; the latter conserves judicial resources by withholding a futile objection that could serve little purpose. See *David*, 83 F.3d at 644 ("Allowing Rule 52(b) review where an objection at trial would have been baseless in light of then-existing caselaw, unlike allowing review where the error was merely 'unclear' at the time of trial, furthers the substantial interest in the orderly administration of justice that underlies the contemporaneous objection rule."). The reasons for the contemporaneous-objection rule equally justify treating defendants differently based on whether they failed to object in the face of unsettled law or settled contrary law.

3. Various policy considerations do not warrant measuring an error's plainness only at the time of review when the law was unsettled at the time of forfeiture

In addition to relying on *Griffith* and principles of retroactivity, petitioner's amicus offers three policy rationales in support of its interpretation: (a) promoting

the ends of justice; (b) focusing on appellate-level proceedings rather than trial-level proceedings; and (c) avoiding any inquiry into whether the law was unsettled at the time of forfeiture. See NACDL Amicus Br. 7-8, 10-12, 14-15; see also *Escalante-Reyes*, 689 F.3d at 421-423; *United States* v. *Farrell*, 672 F.3d 27, 36-37 (1st Cir. 2012); *Cordery*, 656 F.3d at 1106-1107.[8] Setting aside that none of those rationales is grounded in the text or history of Rule 52(b), they lack merit in their own right and do not fully account for all of the purposes of plain-error review.

a. Amicus asserts that assessing an error's plainness only at the time of appeal allows courts "to remedy obvious injustice." Br. 7 (emphasis omitted). That assertion begs the question presented in this case: it assumes that the obviousness of an error should be measured at the time of appeal and that it is an "injustice" to withhold relief from a defendant who slept on his rights. Amicus thus incorrectly assumes that any error that has become obvious by the time of review (even if the error was de-

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[8] Some of the other courts of appeals to endorse petitioner's interpretation have done so in cases where the law was settled against the defendant at trial. See *United States* v. *Garcia*, 587 F.3d 509, 519-520 (2d Cir. 2009); *United States* v. *Ross*, 77 F.3d 1525, 1538-1539 (7th Cir. 1996). Those cases thus fall within *Johnson*. The Eleventh Circuit adopted petitioner's interpretation, but its decision was subsequently vacated on other grounds by this Court. See *United States* v. *Smith*, 402 F.3d 1303, 1315 n.7, vacated on other grounds, 545 U.S. 1125 (2005). The Fourth, Ninth, and District of Columbia Circuits have adopted the government's interpretation. See *Mouling*, 557 F.3d at 664; *Turman*, 122 F.3d at 1170; *David*, 83 F.3d at 642-644; see also *United States* v. *Greer*, 640 F.3d 1011, 1023 (9th Cir.), cert. denied, 132 S. Ct. 834 (2011); but see *United States* v. *Knight*, 606 F.3d 171, 178 (4th Cir. 2010) (holding an error plain even though, according to the court, the law was unsettled at the time of forfeiture).

batable at the time it occurred) is the type of injustice that Rule 52(b) is meant to remedy. Resolving that question, however, requires more than merely pointing to the interest in error correction, because Rule 52(b) balances that interest against "considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact." *Atkinson*, 297 U.S. at 159; see *Puckett*, 556 U.S. at 135 (noting "the careful balance [Rule 52(b)] strikes between judicial efficiency and the redress of injustice"). Amicus does not supply any reason anchored in the text and history of Rule 52(b), or in the purposes underlying the contemporaneous-objection requirement, to conclude that Rule 52(b) strikes that balance in favor of correcting once-debatable but now-clear errors.

Amicus argues that relaxing the second prong of plain-error review would not have unwelcome effects, because the third and fourth prongs would continue to be "stringent requirements" and "substantial incentives to make contemporaneous objections." Br. 13; see *Escalante-Reyes*, 689 F.3d at 423. That argument fails to focus on the specific purpose of the "plainness" prong: to screen out errors whose correction does not seriously undermine the contemporaneous-objection requirement. Remedying an error raised for the first time on appeal does not seriously undermine that requirement when an objection should have been unnecessary (because the error was obvious under prevailing law) or when an objection would have been futile (because there was no error at all under prevailing law). But granting relief on appeal when the error was debatable and the defendant stood silent is wholly at odds with the purposes of requiring a contemporaneous objection. Moreover, ami-

cus's argument assumes that the prongs of plain-error review work at cross-purposes: the second prong maximizes the set of errors that are eligible for correction, whereas the third and fourth prongs minimize that set. To the contrary, each of the three prongs screens out errors for different but complementary reasons; together, they serve to identify the type of egregious errors for which plain-error review is a remedy.

b. Echoing the Seventh Circuit's decision in *Ross*, amicus argues that plain-error review should focus on "whether the severity of the error's harm demands reversal" rather than "whether the district court's action . . . deserves rebuke." Br. 15 (quoting *Ross*, 77 F.3d at 1539). Again, that argument misunderstands the objective of the second prong of plain-error review, which is not to reprove district courts for their mistakes. If that were the sole aim of plain-error review, this Court would not have held in *Johnson* that a district court may be reversed for following then-prevailing law, simply because that law has completely shifted by the time of appeal. Rather, the objective of *Olano*'s second prong is to isolate errors whose correction does not seriously undermine the contemporaneous-objection requirement, because such an objection should have been unnecessary or would have been futile. It is true that where an objection should be unnecessary because the error is obvious at the time under governing law, one benefit of plain-error review is that it encourages trial courts and prosecutors to diligently observe the law. But that is far from the only interest served by plain-error review.[9]

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[9] Relatedly, the Seventh Circuit in *Ross* reasoned that Rule 52(b) should be viewed not as a "measure of district court fault" but as a "means to cabin the appellate court's discretion and to safeguard against erosion of the rule of forfeiture." 77 F.3d at 1539. Rule 52(b),

Amicus's focus on "the severity of the error's harm" under the second prong of plain-error review also fails because that is what the third and fourth prongs do. NACDL Amicus Br. 15. The third prong focuses on the harm to the defendant, *i.e.*, whether the error "affected [his] substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings." *Puckett*, 556 U.S. at 135 (internal quotation marks omitted). The fourth prong focuses on the harm to the federal judicial system, *i.e.*, whether the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Ibid.* (internal quotation marks omitted). Amicus's approach fails to give independent content to the second prong. The plainness of an error simply has no logical relationship to the severity of the error's harm (either to the defendant or to the judicial system).

c. Finally, amicus argues that assessing an error's plainness solely at the time of review avoids a "potentially onerous" inquiry into whether the error also was plain at the time of forfeiture. Br. 10. That argument overstates the difficulty in applying the government's approach. The courts of appeals to consistently do so (the Ninth and District of Columbia Circuits) have not indicated that it is burdensome. Indeed, courts are required to make similar determinations in applying a

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however, applies to both district courts and appellate courts; it is a rule of criminal procedure, not of appellate procedure. See p. 17, *supra*. And the reason that Rule 52(b) cabins courts' discretion, as the Seventh Circuit recognized, is "to safeguard against erosion of the rule of forfeiture." That concern cuts squarely in favor of the government's interpretation, which encourages defendants to timely object in the face of unsettled law for all the same reasons as claim-presentation rules more generally.

number of other doctrines for which relief depends on the state of the law at the time an error occurs.[10] Assessing an error's plainness at the time of forfeiture under Rule 52(b) "would [not] be any more difficult" than those similar determinations that courts "routinely make." *Escalante-Reyes*, 689 F.3d at 430 (Smith, J., dissenting).

Indeed, accounting for an error's plainness at the time of forfeiture will often make plain-error review less onerous for courts. In some cases, it is relatively easy to determine that the second prong of the plain-error rule is not satisfied because the law was unsettled at the time of the district court proceedings. Cf. *Pearson* v. *Callahan*, 555 U.S. 223, 239 (2009) (Courts may be able to "quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional [violation] at all."). In that circumstance, an appellate court is able to reject a forfeited claim with-

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[10] See, *e.g.*, *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1398 (2011) (stating that in applying 28 U.S.C. 2254(d)(1), which provides that federal habeas corpus relief may not be granted to a state prisoner based on an error of law unless the error was contrary to or an unreasonable application of clearly established federal law, a court must refer to the law at "the time the state court renders its decision"); *Bousley* v. *United States*, 523 U.S. 614, 622-623 (1998) (holding that on collateral review, a court examines the time the error occurred in determining how "novel" a rule is for purposes of providing cause for a procedural default); *Teague* v. *Lane*, 489 U.S. 288, 311-312 (1989) (plurality opinion) (providing that new constitutional rules of criminal procedure are generally not applicable to cases that became final before the new rules were announced, so courts apply prior law on collateral review); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818-819 (1982) (holding that public officials have immunity based on what law was clearly established at the time of their acts, even if the law has changed by the time of appeal).

out engaging in the fact-intensive inquiry usually required to determine whether the third and fourth prongs of the plain-error test are met.

This case is illustrative. It was not difficult for the court of appeals to determine that a *Tapia* error was not plain at the time of sentencing because the law was unsettled at that time. See Pet. App. 4a. But if petitioner were to prevail and the case were remanded, the court of appeals would not be able to resolve his *Tapia* claim without a thorough review of the record to determine whether the error was prejudicial in the context of the sentencing and whether the court should exercise its discretion to correct the error because it seriously affects the fairness, integrity, or public reputation of judicial proceedings. Compare *Escalante-Reyes*, 689 F.3d at 423-426 (holding that defendant who claimed *Tapia* error had satisfied all four prongs of plain-error review) with *id.* at 431-449 (Smith, J., dissenting) (concluding that defendant had failed to satisfy the third and fourth prongs); *id.* at 457-458 (Owen, J. dissenting) (concluding that defendant had failed to satisfy the fourth prong). Such inquiries are fact-intensive and singular to the particular case before the court. See *Puckett*, 556 U.S. at 142-143. By contrast, even if it were difficult to determine whether the law was unsettled at the time of forfeiture in a given case, any resulting decision would likely apply to the class of other defendants whose claims arose at roughly the same time.

It is also exceedingly odd to justify petitioner's approach on grounds of judicial economy, even if it saves some time on review. On the front end, petitioner's approach sacrifices the efficiency gains in remedying potential errors when they occur. On the back end, petitioner's approach would "lower[] the bar for plain-error

review, which [would] undoubtedly result in more remands and new trials." *Escalante-Reyes*, 689 F.3d at 431 (Smith, J., dissenting). Thus, "[e]ven assuming that the rule saves appellate resources, that savings will be more than counter-balanced by the need for new trials and resentencings." *Ibid.* Petitioner's interpretation, then, would be doubly inefficient. That weighs heavily against it, because "the [plain-error] standard should enforce the policies that underpin Rule 52(b) generally, to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *Dominguez Benitez*, 542 U.S. at 82. The Court should therefore hold, consistent with Rule 52(b)'s structure, text, history, and purposes, that when the governing law is unsettled at the time of trial, a forfeited error is not clear or obvious for purposes of plain-error review.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 2012

APPENDIX

1. Rule 35 of the Federal Rules of Criminal Procedure provides:

Correcting or Reducing a Sentence

(a) Correcting Clear Error. Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

(b) Reducing a Sentence for Substantial Assistance.

(1) In General. Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.

(2) Later Motion. Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:

(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after

sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

(3) **Evaluating Substantial Assistance.** In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

(4) **Below Statutory Minimum.** When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

(c) **"Sentencing" Defined.** As used in this rule, "sentencing" means the oral announcement of the sentence.

2. Rule 51 of the Federal Rules of Criminal Procedure provides:

Preserving Claimed Error

(a) **Exceptions Unnecessary.** Exceptions to rulings or orders of the court are unnecessary.

(b) **Preserving a Claim of Error.** A party may preserve a claim of error by informing the court —when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A

ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

3. Rule 52 of the Federal Rules of Criminal Procedure provides:

Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

REPLY BRIEF

No. 11-9307

In The

Supreme Court of the United States

ARMARCION D. HENDERSON,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR ARMARCION D. HENDERSON

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OVERVIEW OF FEDERAL RULES OF CRIMINAL PROCEDURE 51 AND 52

The more perplexing a problem seems to be, the more important it is to break it into its component parts and trace them to their origins. Using this approach to resolve the issue before this Court in *Henderson v. United States*, it is clear that the two component parts are Federal Rules of Criminal Procedure 51 and 52. Their origins go back to the earliest years of our country's judicial system. Each is a major principle of law and each must be preserved.

Petitioner Armarcion Henderson contends the principle at the root of Rule 51 is akin to the purpose of Robert's Rules of Order. Our earliest judicial proceedings required a structure which would inform all participants how things would operate. As anyone who has considered the workings of trial courts would agree, errors occur all the time. They are inevitable. Some are minor; some are major. Some deserve redress; some do not.

Rule 51 codifies the common sense rule that if you believe an error has occurred and if you want it to be remedied, you must make notice of the error at the time it occurs. This will put your opposing counsel on notice who will then be in a position to rebut your contention. The matter will be "fleshed out" and the trial judge will be able to address it at a time when the least amount of time, energy and funds will be required to resolve the issue. This is a great principle and for the most part it works very well. But it has a

harsh component too. If trial counsel fails to raise the putative error, his client is faced with a forfeiture of that error and it is lost for all time. He is stuck with a ruling that if correctly decided might have resulted in a much more favorable resolution for him.

Our forefathers also believed in a system that first and foremost protected the fundamental rights of each petitioner who found his way to the court. It was unthinkable that anyone should be forced to suffer infringement of such a right merely due to his lawyer's inattentiveness, lack of competence, or the outright rigors of trial and heat of battle that cannot address each and every issue that arises. And, therefore, an exception to the contemporaneous objection rule and its corollary of forfeiture was established.

The principle supporting Rule 52 is that there must be a mechanism which offers relief to a petitioner who only becomes aware of a putative error after the trial is complete and the time of appeal is available to him. This principle has found application beginning in the earliest years of our judicial system as will be discussed later in this brief. It worked well and brought justice to situations which otherwise would have resulted in clearly erroneous rulings applied unjustly to a party who was at the mercy of his attorney who left him to suffer the results as he himself moved on to the next client.

In 1936 in *United States v. Atkinson*, 297 U.S. 157 (1936), this Court used straightforward language to formally state what our courts had been doing for

over 100 years to ensure that justice prevailed as much as reasonably possible. It was a civil case in which the petitioner was the United States which was arguing for a more favorable ruling on a government insurance contract. Petitioner had not raised the objection at trial and was denied relief on the basis of the contemporaneous objection/forfeiture rule. Judicial economy was emphasized as the basis for the rule.

In dicta which was codified by this Court eight years later as Rule 52, the Court noted that there could be exceptions to this rule – especially in criminal cases where the substantial rights of a person were jeopardized. "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* 159-160. It could be argued that *Atkinson* was the one and only time the two principles underlying Rules 51 and 52 were clearly distinguished.

By the time *Olano v. United States*, 507 U.S. 725 (1993), was decided, the two principles underlying Rules 51 and 52 as discussed in *Atkinson* were so conflated that their sparse words frequently caused confusion when the issue arose. The circuit courts were perplexed as to when the claimed error had to be clear. Some held it was time of trial and others held time of appeal. This resulted in disparity in applications of Rule 52 across the country. This Court

was unsure of exactly how it felt about application of the rule. In "*Olano*" it did find that though the putative error had not been preserved at trial, petitioner was properly before the Court for review because the error was clear at trial and continued to be so. So we had application of Rule 51 tempered by application of Rule 52. That was as it should be. But then the waters became murky. This Court went on to note that it was not sure how it would rule in the "special case" where the error was not clear at trial but became clear by the time of appeal. *Id.* 734. That was an issue that was a Rule 51 "Robert's Rules of Order" type of question. It should have had nothing to do with the question of whether the petitioner had suffered grave injustice and was deserving of a remedy. An appellate court would be remiss if on direct appeal it applied a law it knew to be wrong. See Chief Justice Marshall's words in *The United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801).

The waters were further muddied in 1997 with the decision of *Johnson v. United States*, 520 U.S. 461 (1997). Here the two major principles were further conflated resulting in an outcome allowing petitioner to proceed with her appeal under Rule 52(b) even though no error existed at time of trial and there was nothing to which her lawyer could have objected. This Court created yet another route for a petitioner to traverse the muddy waters of "plain error review" and reach review of his putative error – if the error was plain/clear/obvious at the time of appeal.

So as it presently stands, federal criminal petitioners have three potential routes which might lead

to review and eventual remediation by a court of appeal even though no objection was made and preserved at the trial court:

> Route No. 1: The error is *plain/clear/obvious at time of trial* but petitioner's attorney fails to preserve the error because he does not object and raise the issue to the trial court;
>
> Route No. 2: There is *no error at the time of trial* to which trial attorney can object since the putative error only becomes known at time of appeal;
>
> Route No. 3: The putative error is *unsettled at the time of trial* and the trial attorney fails to object and preserve the error.

Befuddling to Armarcion Henderson and his counsel is the fact that Routes 1 and 2 lead to a chance of review and remediation by an appellate court and yet his route does not. Route 1 could most easily be argued as an example of the infamous "sandbagging." Route 2 makes no sense at all because there was no error about which counsel could object. Yet they get their chance of review. Armarcion Henderson's counsel failed to object to a putative error at his sentencing at a time when the issue was not decided definitively one way or the other. He does not understand why he should be deprived of the same Rule 52(b) review to which Guy Olano and Joyce Johnson were entitled.

DISPUTES BETWEEN THE PARTIES

Respondent contends under Federal Rule of Criminal Procedure 52(b) "an error is not plain when the law is unsettled at the time the claim of error is forfeited." (Br. 10). In essence, respondent contends there can *never* be a Rule 52(b) remedy for a petitioner who failed to raise an objection at the trial court if the point of law was *unsettled* at the time of trial.

Respondent correctly points out that the basic premise of the common law rule set forth in Rule 51 is that to preserve a claimed error, a defendant *must* put the trial court on notice of his objection to the court's ruling and the grounds for that objection at the time of trial itself, or his claim of error will not be preserved. This is indeed a harsh rule. But for well over a hundred years before the Federal Rules of Criminal Procedure even existed, our courts have tempered that principle. When this Court adopted the Federal Rules in 1944, it included in Rule 52 not merely a remedy for the petitioner whose lawyer adroitly raised the putative error in the trial court, [52(a)] we also find a remedy for a petitioner who was not so lucky, but whose lawyer finally did raise the error on appeal, [52(b)].

Rule 52. Harmless & Plain Error

> **(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.**

> **(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.**

Advisory Committee Notes to the 1944 adoption of Rule 52 note that 52(b) is a restatement of existing law dating back to *Wiborg v. United States*, 16 S.Ct. 1127 (1896); *Hemphill v. United States*, 112 F.2d 505, C.C.A. 9th, reversed 312 U.S. 657, cert. denied 314 U.S. 627 (1940). The Committee felt it was worth mentioning that Supreme Court Rule 27 provided for the Supreme Court itself to notice plain error whether assigned, specified, or not; and that similar provisions were found in the rules of several circuit courts of appeals at the time.

Respondent contends "*Johnson relaxed* the plain-error standard when a timely objection would be pointless under contrary controlling precedent." (Br. 9) Emphasis added. That characterization of this Court's ruling in *Johnson* seems questionable at best as will be discussed later.

Respondent further argues that as to *Griffith v. Kentucky's*, 479 U.S. 314 (1987) "principles of retroactivity, [they] are relevant to the substantive law that applies at the first prong of plain-error review (i.e. whether error occurred), but they shed no light on the second prong of plain-error review (i.e. whether the error was obvious."). (Br. 10). Respondent seems to have conflated two very different principles – i.e. the requirements of contemporaneous objection/forfeiture as opposed to the question of the remedies which might be available to the petitioner who suffered

prejudice to substantial rights but who had not preserved the objection.

Lastly respondent contends that the underlying purposes of Rule 52(b) "cut strongly in favor of correcting only forfeited errors whose plainness would have been apparent at trial," (Br. 10) and, that "Rule 52(b) provides a narrow and limited exception to that general rule when an objection would be futile (because the law is settled against the defendant) or when an objection should be unnecessary (because the error is obvious under existing law." (Br. 11) This analysis leaves respondent in the inexplicable position of holding out hope of remedy; first, to a petitioner who had the law absolutely in his favor at the time of trial but who did nothing to point this out until the time of appeal; and second, hope of a remedy to a petitioner who had nothing to raise as an objection at the time of trial because at that point there was no error as the law was clearly against him and the trial judge did exactly as he should. This analysis leaves the poor soul who was in trial while the error was still unsettled as the only petitioner who has no hope of receiving a remedy on appeal. Such an outcome does not comport with the underlying purpose of Rule 52(b) which is to act as a safety valve for injustice occurring at the trial court but which was not preserved. The only reasonable resolution to this awkward and unjust interpretation of Rule 52(b) is for this Court to find that error which is clear and obvious at the time of appellate consideration satisfies the

requirements of "plain error" as discussed in prongs one and two in the *Olano* analysis.

THE STRUCTURE, TEXT, HISTORY AND PURPOSES OF RULE 52(b) INDICATE THAT AN ERROR IS SUFFICIENT FOR APPLICATION OF RULE 52(b) REMEDIATION REVIEW IF IT IS CLEAR AND OBVIOUS AT TIME OF APPELLATE REVIEW

1. The history of appellate courts tempering the harsh principle of contemporaneous objection/ forfeiture requirements of common law are as old as our country.

Who could resist a review of *The United States v. The Schooner Peggy* found at 5 U.S. (1 Cranch) 103, 2 L.Ed. 49 (1801). The ship sailed under the French flag and was captured as a prize on April 24, 1800, by an armed vessel commanded by David Jewitt, Esq. The captors' victory was short-lived, however and they were ordered by the district court of Connecticut to return the ship and her cargo to her owner. But in September 1800 the captors appealed to the Connecticut circuit court which reversed the district court's decree and condemned the "Peggy" and her cargo as prize. "Peggy's" owners then appealed to the U.S. Supreme Court by way of a writ of error. As the matter languished in the court, a convention between the United States and the French Republic was signed and eventually ratified by the President of the United States on December 21, 1801.

But why is this case of any concern to us today? – Because of the words written by Chief Justice Marshall in the Court's decision.

> "It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied . . . In such a case the court must decide according to existing laws and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." *Id.* 110

Clearly the issue of superceding laws and clarifying decisions is nothing new to our judicial system. Our history tells us justice may require overruling a lower court even if it may have been correct at the time it ruled.

Ninety years after *The Schooner Peggy* the words "plain error" began to appear in our jurisprudence. Long before this Court adopted the first Federal Rules as we now know them, criminal defendants had the benefit of a "plain error" rule. In a lengthy and passionate dissenting opinion Mr. Justice Field referred to Section 997 of the Revised Statutes which required specific assignment of errors by any petitioner who sought review by the court. Defendant John O'Neil of Whitehall, New York who engaged in

the sale of intoxicating liquors across the state line in Rutland, Vermont, was convicted of 307 offenses and sentenced to 54 years of imprisonment. In the matter of *O'Neil v. U.S.*, 144 U.S. 323, 360 (1892), Justice Field pointed to Rule 21 of the Court and urged: "We should allow additional assignments to be filed, or take notice of the error of our own motion under rule 21 . . . that injustice and wrong may not be perpetrated." He argued that rule 21 permitted "the court at its option to notice a plain error not assigned or specified. This rule seems to provide for a case like the present, and I do not think we should be astute to avoid jurisdiction in a case affecting the liberty of the citizen." *Id.* 360. Justice Field was particularly concerned by the severity of the punishment: "for these transactions . . . which no power of the human intellect can accurately describe except as transactions of interstate commerce." *Id.* 365. The foundation of plain error review of sentencing errors was already being set down. Note that this case did not involve a clarifying law or decision.

On March 3, 1891, Congress passed the act creating our federal circuit courts of appeals. It also created the statutes previously mentioned in *O'Neil*. See also *In re Claasen*, 140 U.S. 200, 202 (1891) which was one of the first cases in which a petitioner's right to appeal to the Supreme Court was affirmed (noting that the case was not yet final) as well as discussing the waiving and abandoning of certain of his alleged trial court errors. *Id.* 204. Once again the concern was fairness and justice to the defendant.

In the same time frame, 1891, William Caldwell filed a writ before this court seeking a reversal of his murder conviction based on an alleged error in the indictment. He was denied his remedy but the case is worth noting for its discussion of the lack of evidence to show any of his substantial rights were prejudiced. See *Caldwell v. State of Texas*, 137 U.S. 692, 696 (1891).

The preceding cases support petitioner's contention that this court has always been amenable to consider appeals of petitioners who had not preserved alleged trial court errors. The early cases made no mention of the need to be concerned about judicial efficiency and the impact such appeals and potential reversals might have on the trial courts or judges. The focus has always been on whether an injustice had befallen the petitioner and if it had, was it serious enough to warrant reversal.

2. The text and structure of Rule 52(b) support an interpretation that the putative error had only to be clear at time of appeal. The government's briefs both in *Henderson* and in *United States v. Escalante-Reyes*, 689 F.3d 415 (5th Cir. 2012) (en banc) (in which the Fifth Circuit recently reversed its position on when "error" must be plain for purposes of Rule 52(b) review to bring it in line with the majority of the circuits) stress the need for judicial efficiency as the primary reason for the contemporaneous objection rule. Petitioner has no quarrel there. But the government loses historical factual support (and petitioner's concurrence) when it expands the argument to say

"An examination of the history and development of the plain-error rule confirms that it was designed to promote judicial efficiency with error correction permitted only in 'exceptional circumstances.' *United States v. Atkinson*, 297 U.S. 157, 160 (1936)." See Government's Supplemental Brief in *Escalante-Reyes*, 13-16. This simply is not supported by the jurisprudence.

The government argues that the text of Rule 52(b) requires that the error must be plain at the time of forfeiture as well as on appeal. (Gov. Br. 18) There simply is nothing to support this conclusion. The government focuses attention on the second and subordinate clause of Rule 52(b) and argues that the pronoun "it" must be read to refer not merely to the noun "error" but to the noun and its modifying adjective i.e. "plain error." This is quite a stretch. The "backward looking" and the "forward looking" analysis seems inapplicable in discussing Rule 52(b) in our situation where petitioner is on direct appeal under the Federal Rules of Criminal Procedure and not under the civil rules of habeas corpus.

Once again, there is no textual basis in Rule 52(b) for giving the word "plain" a different meaning in cases where the law is unsettled at the time of trial (Henderson's situation) as opposed to flat-out contrary (Joyce Johnson's situation) to the law at time of appeal. As Judge Owen stated in her (concurring and dissenting) opinion in *Escalante-Reyes*, the word "plain" can't mean one thing in *Johnson* and another in cases like this one.

Moreover, the government itself has recognized and argued this position. See its brief in *Johnson v. United States*, No. 96-203 (O.T. 1996). (This brief is available on Westlaw at 1997 WL 37887. See page 11, headnote 21.)

> Petitioner's position would require the courts of appeals to draw an amorphous distinction between the "special case" [described in *Olano* where the law was unsettled at the time of trial] and the other class of cases in which an error becomes "plain" only on appeal: cases, such as this one, in which the district court action later challenged as error was, at the time of trial, compelled (rather than merely suggested or allowed) by circuit precedent. **But nothing in the text of Rule 52(b) contemplates or permits any such distinction: an error is either "plain" (because it is clearly barred by controlling law) or it is not. It is more faithful to the text of Rule 52(b), and simpler for the courts of appeals, to obviate that distinction altogether by treating alike all cases is which an error was not "plain" at the time of trial.** (Emphasis added.)

The Court made it clear that whether there was an "error" for purposes of Rule 52(b) was to be assessed only at the time of appeal. *Johnson* at 467. This Court considered the government's interpretation requiring plain error to exist both at trial and at appeal in *Johnson*. It rejected that approach. There is no reason

why it should apply that standard in Armarcion Henderson's situation.

It bears noting that during the oral argument in the *Johnson* case, several justices seemed to favor an interpretation of Rule 52(b) and the definition of "plain error" which is in line with petitioner Henderson's. Justice Scalia pointed out that the rule doesn't refer to "errors that were plain . . . It says plain errors may be noticed. I think that's susceptible of the interpretation that errors that at the time you evaluate them are plain." (Oral argument *Johnson* p. 16) Available at 1997 WL 92112 (U.S.) A little later in the argument the Court posed a solution where cases such as *Johnson* weren't reviewed as truly a plain error case, but with a new rule for new rule cases and go right to something like the fourth prong of *Olano*. Mr. Dreeben, the Solicitor General, responded that if the Court would ultimately ask the same question that is comprehended by the fourth prong of *Olano*, "I think the Government could live with a formulation such as Your Honor is describing." *Id.* 15-16.

CONCLUSION

Petitioner believes Justice Breyer may well have come up with the best description of what Rule 52(b) was created to do. Oral argument, *Johnson*, p. 14:

> "[I]t sounds from the history of the plain error rule that it was meant to codify cases from this Court that described it as a kind of

> grab bag, not having a clear definition but designed to permit a court of appeals to correct a really serious problem . . . described in one case as a matter of fairness, integrity, or public confidence in the proceeding. You know, general, but what it shares in common is that something really important went wrong."

A few minutes later when a justice noted, "I think plain error can be like a grab-bag, including errors that are plain only to the court of appeals . . . on that assumption, then do you lose?" Mr. Dreeben responded "No. We then proceed to our second argument on why this case does not entitle petitioner to relief under the plain error rule. The fourth and final prong of *Olano* requires the court to examine whether correcting the error serves the fairness, integrity and public reputation of judicial proceedings." Oral argument, *Johnson* p. 17.

There is no support to find that the second prong of *Olano* was meant to serve as a way to punish a petitioner for not having preserved his error at trial. Nor is it meant to sift through errors that merit review based on their clarity at trial. Just as the concern of *Griffith v. Kentucky*, 479 U.S. 314 (1987), is with equality of treatment, not equality of outcome, requiring that an error need only be plain at the time of appeal for Rule 52(b) assessment leaves the third and fourth prongs of *Olano* to determine the ultimate outcome.

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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ERRATA

Counsel humbly apologizes for the following errors in the Merits Brief filed earlier in this proceeding and hopes they did not result in significant confusion or distraction:

1. Page 6: The last paragraph of "Summary of Argument" incorrectly states "time of trial standard" when is should state "time of appeal standard."

2. Page 16: Justice Kennedy's opinion was referred to as a dissenting opinion in *Olano*, when in fact it was a concurring opinion.

3. Page 25: Justice Clark was incorrectly referred to as Chief Justice Clark.

AMICUS CURIAE BRIEF

No. 11-9307

In The
Supreme Court of the United States

ARMARCION D. HENDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER AND URGING REVERSAL

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QUESTION PRESENTED

Whether an error is "plain" for purposes of review under Fed. R. Crim. P. 52(b) when the law is unsettled at the time the error is committed but becomes clear by the time of a subsequent appeal.

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INTEREST OF AMICUS CURIAE[1]

Amicus National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL files numerous amicus briefs each year in this Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Because plain error review under Fed. R. Crim. P. 52(b) occurs frequently on appellate consideration of federal criminal

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[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court under Rule 37.2(a).

convictions and the nature of that review may be outcome-determinative, NACDL believes that its views on the question presented here will be of value to the Court.

SUMMARY OF ARGUMENT

In *Johnson v. United States*, 520 U.S. 461 (1997), eight Justices agreed that "in a case such as this--where the law at the time of trial was settled and clearly contrary to the law at the time of appeal--it is enough that an error be 'plain' at the time of appellate consideration." *Id.* at 468. The issue here is whether the language of Fed. R. Crim. P. 52(b) or its underlying policies require a different rule--measuring "plainness" at the time of trial rather than at the time of appeal--when the law was unsettled at the time of trial.

As a majority of the courts of appeals have recognized, including the en banc Fifth Circuit (in a decision rendered after the panel decision here), the answer is no.[2] The term "plain" should receive a consistent interpretation, regardless of whether the law is settled at the time of trial. As the government acknowledged in its *Johnson* brief, nothing in the text of the rule permits the meaning of the word

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[2] In the wake of the en banc Fifth Circuit's adoption of the "time of appeal" rule, *United States v. Escalante-Reyes*, 2012 U.S. App. LEXIS 15385 (5th Cir. July 25, 2012) (en banc), only the Ninth and D.C. Circuits continue to follow the "time of trial" rule, *see United States v. Mouling*, 557 F.3d 658, 663-64 (D.C. Cir. 2009); *United States v. Turman*, 122 F.3d 1167, 1170 (9th Cir. 1997).

"plain" to vary depending on the settled or unsettled state of the law at the time of trial.

Nor does any policy justify varying from the *Johnson* "time of appeal" rule when the law is unsettled in the district court. The "time of appeal" rule advances Rule 52(b)'s policy of permitting obvious injustices to be corrected on appeal. It serves the goal of treating similarly situated defendants equally. And it avoids wasteful appellate litigation over whether particular issues were "settled" or "unsettled" at the time of trial. A "time of trial" rule would thwart all of these important interests.

The sole interest that a "time of trial" rule would support--encouraging contemporaneous objections--is adequately served by other aspects of the strict four-prong plain error standard set out in *United States v. Olano*, 507 U.S. 725 (1993).

For these reasons, the Court should extend the *Johnson* "time of appeal" rule for measuring "plainness" to all cases, regardless of whether the law was settled when the district court ruled.

ARGUMENT

I. THE TEXT OF RULE 52(b) REQUIRES A UNIFORM INTERPRETATION OF THE WORD "PLAIN."

Rule 52(b) provides that "[a] plain error that affects substantial rights may be considered even

though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). The government argued in *Johnson* that the text of the rule requires that the error be "plain" both at the time of trial and at the time of appeal. *Johnson v. United States*, No. 96-203, Brief for the United States at *30-*33, 1997 U.S. S. Ct. Briefs LEXIS 452 (Jan. 29, 1997) ["G. *Johnson* Br."]. The Court's holding that an error need only be plain at the time of appeal necessarily rejected the government's textual argument.

Johnson establishes that the text of Rule 52(b) permits plainness to be measured at the time of appeal when the law is clear at the time of trial. That same text cannot receive a different meaning when the law is unsettled at the time of trial. *See United States v. Escalante-Reyes*, 2012 U.S. App. LEXIS 15385, at *3-*5 (5th Cir. July 25, 2012) (en banc). This Court has made clear that a statutory term must receive the same interpretation in each of the statute's applications, even if one of those applications requires a limiting construction. As the Court put it, "It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern." *Clark v. Martinez*, 543 U.S. 371, 380 (2005). Under this principle, the *Johnson* interpretation of the term "plain" governs not only the

"application" at issue there, but also the "application" here.[3]

The government made this very point in its *Johnson* brief. Noting that this Court in *Olano* had described the "unsettled at trial" circumstance as a "special case" that did not have to addressed, *see Olano*, 507 U.S. at 734, the government argued:

> Petitioner's position would require the courts of appeals to draw an amorphous distinction between the "special case" [where the law is unsettled] and the other class of cases in which an error becomes "plain" only on appeal: cases, such as this one, in which the district court action later challenged as error was, at the time of trial, compelled (rather than merely suggested or allowed) by circuit precedent. . . . But nothing in the text of Rule 52(b) contemplates or permits any such distinction: an error is either "plain" (because it is clearly barred by controlling law) or it is not.

G. *Johnson* Br. at *32-*33.

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[3] Because the Federal Rules are "legislative enactment[s]," this Court interprets them using the "traditional tools of statutory construction." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988) (Fed. R. Evid. 106) (quotation omitted); *see, e.g., United States v. Vonn*, 535 U.S. 55 (2002) (Fed. R. Crim. P. 11(h)).

On this point, the government is correct. There is no textual basis to draw the "amorphous distinction" between the "settled at trial" circumstance in *Johnson* and the "unsettled at trial" circumstance here. Instead, in the government's words, "It is more faithful to the text of Rule 52(b), and simpler for the courts of appeals, to obviate that distinction altogether by treating alike all cases in which an error was not 'plain' at the time of trial." *Id.* at *33. In accord with this reasoning, and with the principles set out in *Martinez*, the *Johnson* "time of appeal" rule should apply in all cases, regardless of the settled or unsettled state of the law at trial.

II. THE POLICIES OF REMEDYING OBVIOUS INJUSTICE, TREATING SIMILARLY SITUATED DEFENDANTS EQUALLY, AND CONSERVING JUDICIAL RESOURCES SUPPORT THE "TIME OF APPEAL" RULE.

The "time of appeal" rule serves three important interests: it advances Rule 52(b)'s central purpose of permitting appellate courts to remedy obvious injustice; it ensures that similarly situated defendants are treated equally; and it conserves judicial resources that otherwise would be wasted trying to determine whether obsolete law was "settled" or "unsettled" at the time of trial.

A. The "Time of Appeal" Rule Permits Appellate Courts to Remedy Obvious Injustice.

Rule 51 of the Federal Rules of Criminal Procedure establishes the contemporaneous objection rule. It provides that a party "may preserve a claim of error by informing the court--when the court ruling or order is made or sought--of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b); *see also, e.g.*, Fed. R. Crim. P. 30(d); Fed. R. Evid. 103(a). The plain error doctrine of Rule 52(b) "tempers the blow of a rigid application of the contemporaneous-objection requirement" by permitting "obvious injustice" to be corrected on appeal. *United States v. Young*, 470 U.S. 1, 15 (1985) (quotation omitted); *see, e.g., United States v. Frady*, 456 U.S. 152, 163 (1982) ("Rule 52(b) was intended to afford a means for the prompt redress of miscarriages of justice.").

It is irrelevant to the correction of "obvious injustice" whether the obviousness of the injustice becomes apparent before or after trial. As long as the injustice is obvious when the appellate court considers the case, the function of the plain error rule is implicated. *See, e.g., United States v. Farrell*, 672 F.3d 27, 36-37 (1st Cir. 2012).

The "time of appeal" rule reflects this point. It permits the correction of obvious injustice on direct appeal regardless of when the injustice becomes obvious. The "time of trial" rule, by contrast,

thwarts a core purpose of Rule 52(b) by categorically barring an appellate court from correcting an injustice that is obvious to that court, merely because it may not have been obvious to the district court. *See United States v. Smith*, 402 F.3d 1303, 1315 n.7 (11th Cir.) ("In practice, [the 'time of trial' rule] is the same as no plain error review at all, as error will never be 'plain' under 'unsettled' law."), *vacated on other grounds*, 545 U.S. 1125 (2005).

B. The "Time of Appeal" Rule Treats Similarly Situated Defendants Equally.

This Court has often recognized the basic principle that similarly situated defendants should be treated equally. That is the fundamental premise of the Court's retroactivity doctrine, which holds that new decisions must be applied equally to all cases pending on direct appeal. As the Court explained, an approach that "fish[ed] one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitt[ed] a stream of similar cases subsequently to flow by unaffected by that new rule" would "violate[] the principle of treating similarly situated defendants the same." *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987) (quotation omitted).

The "time of trial" rule for determining the plainness of error similarly "violates the principle of treating similarly situated defendants the same." That rule requires disparate treatment of defendants who forfeit error based solely on the happenstance of

when during the trial and direct review process the error becomes plain. Consider, for example, two defendants who, like petitioner here, are given longer prison terms to afford time for rehabilitation, in violation of 18 U.S.C. § 3582(a). Neither defense counsel objects to the error. One defendant is sentenced on June 15, 2011, the day before this Court decides *Tapia v. United States*, 131 S. Ct. 2382 (2011). The other is sentenced on June 17, 2011, the day after *Tapia* is decided. Both appeal.

Under the "time of trial" rule, the first defendant could not obtain review under Rule 52(b), because his error would not be "plain," while the second defendant could. That difference in treatment cannot be justified. Some line-drawing is essential in the criminal justice system; for example, a defendant on direct appeal gets the benefit of a new decision under *Griffith*, while a defendant whose direct appeal ended before the new decision may not get its benefit on collateral review. But such lines generally serve some purpose, such as promoting finality. The line that the "time of trial" rule draws between the two defendants in the example above serves no such purpose. It is an arbitrary distinction that categorically cuts off certain defendants from the "obvious injustice" safety valve of Rule 52(b).

By contrast, the "time of appeal" rule treats the two defendants equally; both can establish that the district court's error is "plain" in light of *Tapia*. That rule thus advances the goal of "evenhanded

justice" for similarly situated defendants. *Teague v. Lane*, 489 U.S. 288, 300 (1989).

C. The "Time of Appeal" Rule Avoids Wasting Judicial Resources on Determining Whether Law Was "Settled" at the Time of Trial.

The "time of appeal" rule has a third benefit: it "allows the reviewing court to avoid the elusive and potentially onerous case-by-case determination of whether the law was 'settled' or 'unsettled' at the time of trial." *Farrell*, 672 F.3d at 37; *see, e.g., Escalante-Reyes*, 2012 U.S. App. LEXIS 15385, at *18.

As the government acknowledged in *Johnson*, the distinction between settled and unsettled law is "amorphous." G. *Johnson* Br. at *32. In this case, for example, one could argue that 18 U.S.C. § 3582(a) had settled the rule that a prison sentence could not be lengthened merely to permit rehabilitation even before *Tapia*. That decision, after all, was unanimous and involved a straightforward application of the statute's plain language. The issue was so devoid of dispute that the Solicitor General joined the defendant-petitioner in seeking vacatur of the court of appeals' decision, and the Court had to appoint an amicus to defend the ruling below. *See Tapia*, 131 S. Ct. at 2386 n.2. Under these circumstances, it is certainly debatable whether the law was "unsettled" when Henderson was sentenced. But such a backward-looking debate

over the status of obsolete law serves no purpose and should not detain the appellate courts.

Another example illustrates the time-consuming and ultimately pointless determinations that the "time of trial" rule forces the courts of appeals to undertake. In *United States v. Mercado-Ortiz*, 380 Fed. App'x 565 (9th Cir. 2010) (unpublished), the Ninth Circuit applied the "time of trial" rule to determine whether it should consider two recent decisions in assessing whether the district court's error at sentencing was "plain." The court first analyzed whether its decisons at the time of trial settled the law against the defendant--which would have triggered the *Johnson* rule--but found that they did not. It then analyzed whether those decisions settled the law in favor of the defendant, which would have made the error plain at the time of the trial. *Id.* at 567-68. It again concluded that they did not. *Id.* Having undertaken this laborious analysis, the court determined that the law was unsettled at the time of trial and that the district court's error, although obvious at the time of appeal in light of the recent decisions, was not "plain" for purposes of Rule 52(b).

Under the "time of appeal" rule, none of this analysis of obsolete law, divorced from the merits of the case or the purpose of the plain error rule, would have been necessary. Judicial economy thus supports adoption of the *Johnson* approach in "unsettled at trial" cases. *See Smith*, 402 F.3d at 1315 n.7 ("time of appeal" approach "has the advantage of avoiding the necessity of distinguishing

between cases in which 'the law at the time of trial was settled and clearly contrary to the law at the time of appeal' on the one hand and cases in which it was merely 'unsettled' on the other").

III. THE "TIME OF APPEAL" APPROACH DOES NOT UNDERMINE THE CONTEMPORANEOUS OBJECTION RULE OR UNFAIRLY IMPUGN DISTRICT JUDGES.

The preceding part shows that the "time of appeal" rule permits appellate courts to remedy obvious injustice, ensures that similarly situated defendants are treated equally, and advances judicial economy. No countervailing interest weighs against the rule.

A. The "Time of Appeal" Approach Does Not Undermine the Contemporaneous Objection Rule.

Courts rejecting the "time of appeal" approach maintain that it undermines the contemporaneous-objection rule of Rule 51(b). *See, e.g., United States v. Mouling*, 557 F.3d 658, 664 (D.C. Cir. 2009); *United States v. Turman*, 122 F.3d 1167, 1170 (9th Cir. 1997). This concern is misplaced.

"Plainness" is only one of the requirements to obtain relief under Rule 52(b). An appellant must establish error; he must show that the error was "clear" or "obvious"; and he must persuade the court that the error "affect[ed] substantial rights." *Olano*,

507 U.S. at 733-34. Even if the appellant meets these requirements, the court of appeals has discretion to deny relief unless the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 736 (quoting *United States v. Atkinson*, 297 U.S. 57, 160 (1936)).

Given these stringent requirements for plain error review, defense counsel have ample incentive to comply with the contemporaneous objection rule. A timely objection may permit the defendant to obtain a favorable ruling from the district court. If that court denies relief, an objection gives the defendant the benefit of the ordinary standard of review on appeal. These are substantial incentives to make contemporaneous objections; adopting the "time of appeal" rule, rather than the "time of trial" rule, will not significantly reduce them.

Adopting the "time of appeal" rule in "unsettled law" cases does not increase the risk that counsel will "sandbag"--remain silent at trial for tactical reasons. *Puckett v. United States*, 556 U.S. 129, 134 (2009). As the en banc Fifth Circuit observed, "In the vast majority of plain error cases, there will be no intervening Supreme Court decision, meaning that establishing a 'time of appeal' rule would not significantly alter trial counsel's incentive to object." *Escalante Reyes*, 2012 U.S. App. LEXIS 15385, at *16. Even in the rare case where a party knows at trial that an appellate decision on a contested issue is imminent, the party would be unwise to withhold objection, because it "would be taking a risk that the appellate court would not rule

in its favor on the unsettled issue." *Id.* at *15-*16. And even if the appellate court *did* resolve the unsettled issue in the party's favor between trial and appeal, the party still would run the risk that the court of appeals would not find the third and fourth plain error prongs satisfied.

With so many incentives to lodge timely objections, the risk of sandbagging is minimal, with or without the "time of appeal" rule.

B. The "Time of Appeal" Approach Does Not Unfairly Impugn District Judges.

Some appellate courts have concluded that the "time of appeal" rule unfairly impugns district judges, by finding "clear" or "obvious" error even where the law was unsettled at the time of trial. *See, e.g., Turman*, 122 F.3d at 1170 ("[W]e expect district judges to be knowledgeable, not clairvoyant."); *Escalante-Reyes*, 2012 U.S. App. LEXIS 15385, at *92-*93 (Garza, J., dissenting). If this argument were valid, it would apply with even greater force in the *Johnson* circumstance, where the law at the time of trial was settled in favor of the district court's ruling. But the government advanced the argument in *Johnson* as a reason to adopt the "time of trial" rule, G. *Johnson* Br. at *34-*35, and the Court was unpersuaded.

The argument did not carry the day in *Johnson*, and it should not prevail here, because it misconstrues the purpose of Rule 52(b). The plain

error rule permits an appellate court to prevent obvious injustice; its purpose is not to grade the trial judge's work. Accordingly, "[T]he focus of plain error review should be 'whether the severity of the error's harm demands reversal,' and not 'whether the district court's action . . . deserves rebuke.'" *Farrell*, 672 F.3d at 36 (quoting *United States v. Ross*, 77 F.3d 1525, 1539-40 (7th Cir. 1996)); *see Escalante-Reyes*, 2012 U.S. App. LEXIS 15385, at *16-*17. Appellate courts finding error that is plain at the time of appeal should not forego correcting obvious injustice merely to spare the feelings of the district judge; those courts should correct the injustice and note, if appropriate, that no rebuke is intended.

CONCLUSION

For these reasons, the Court should extend the *Johnson* "time of appeal" rule to all cases. Petitioner's sentence should be vacated.

Respectfully submitted,

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